United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1777

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P/s

In The

United States Court of Appeals

For The Second Circuit

ESTHER FRIEDLANDER as Surviving Executrix of the Estate of Raphael Cohen,

Plaintiff-Appellant,

- against

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., AGRIN LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants-Appellees.

Appeal from Order of the United States District Court for the Southern District of New York.

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

(Continued on Next Page)

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DOCKET ENTRIES

DATE	
June 17-70	Filed complaint and issued Summons
July 8-70	Filed Notice of Appearance for Harris, Kerr, Foster & Co.
July 8-70	Filed Stip. & order extending deft. Harris, Kerr etc. time to ans. to 8-12-70 - Ryan, J.
July 14-70	Filed stip. & Order extending time of all defts. who have been served to ans. complaint to 8-13-70. So ordered. Croake, J.
July 22-70	Filed Notice of Examination Before Trial.
Aug. 7-70	Filed stip. & order extending deft. Harris, Kerr, Forster &Co.'s time to ans. complaint to 9-10-70. So ordered. Cooper, J.
August 19-70	Filed stip. & order adjourning time of all defts. to ans. until 30 days after completion of depositions of the plaintiffs. So ordered. Frankel, J.
Aug. 25-70	Filed deft. ans. to complaint. (Lawson & Holland).

DOCKET ENTRIES

DATE	
Aug. 25-70	Filed stip. & order that time of defts. Lawson & Holland to answer the complaint be extended to 8-26-70. MacMahon, J.
Sept. 9-70	Filed Notice to Take Deposition.
Sept. 17-70	Filed Notice to Take Deposition of Abraham Cohen, Esther Friedlander.
Oct. 29-70	Filed summons with marshal's ret. Served: William Zeckendorf personally on 7-16-70. Drake Associates, by Morton Porwick, Office Mgr. on 10-20-70. Peter I. Feinberg by Morton Porwick on 10-20-70. Louis Adler c/o Louis Adler Realty Co. by Ruth Kiernan on 6-23-70. Alfred Kaplan personally on 7-10-70. Peter I. Feinberg Securities Corp. by Morton Porwick on 6/23/70. Harris, Kerr, Forster & Co. by Ernest M. Krauth, Office Mgr. on 6-22-70.

DOCKET ENTRIES

DATE	
	Agrin Lawson & Holland by John Doe, Office Mgr. on 7/8/70. Marvin Greenspan UNABLE TO SERVE - Also Domax Securities Corp., Zeckendorf Hotels Corp., Peter I. Feinberg and Drake Associates; Samue: Sockol
Jan. 21-71	Filed Affdvt. & consent order of substitution of atty. for pltff. So ordered Cannella, J.
May 2-72	Filed deft. Peter Feinberg will take deposition of A. Cohen & E. Friedlander on 5-10-72.
June 2-72	Filed deft's notice to take deposition of pltff's on 6-27-72.
June 7-72	Filed deft's Harris, Kerr, Forster & Co. Notice To Take Deposition of pltff's on 6-27-72.
Jan. 26-73	Filed defts' First Set of Interrogatories.
May 14-73	Filed Pltffs. Demand for Production of Documents for inspection & copying pursuant to FRCP.
May 14-73	Filed Pltffs. Notice of Deposition upon William Zeckendorf.

DOCKET ENTRIES

DATE	
June 12-73	Filed Defts. Peter I. Feinberg, Feinberg Securities Corp & Drake Associates Notice of Motion. Re:/Summary Judgment. ret. 7-24-73.
June 12-73	Filed Defts. Memorandum in Support of Motion for Summary Judgment.
June 13-73	Filed Deft. Harris, Kerr, Forster & Co., Notice of Motion to Dismiss Complaint.
June 13-73	Filed Memorandum on behalf of deft. Harris Kerr Forster & Co., in support of motion for summary judgment dismissing complaint.
June 13-73	Filed Affidavit of Service by Mail for Memorandum in Support of Motion for Summary Judgment.
June 15-73	Filed Notice of Motion by deft. William Zeckendorf & Zeckendorf Hotels Corp. Re: dismiss complaint. ret. 7-24-73.
June 6-73	Filed plaintiffs response to defts. 1st set of interrogs.

DOCKET ENTRIES

DATE	
June 14-73	Filed Aff. of Kenneth A. Sagat in support of motion to dismiss.
Jan. 22-74	Filed Memo. End. on motion dated 6-12-73. Motion denied in accordance with memorandum decision filed herewith. Ward J. (mailed notice).
Jan. 22-74	Filed Memo. End. on motion dated 6/13/73 Motion denied in accordance with memo decision filed herewith. Ward J. (mailed notice).
Jan. 22-74	Filed Memo. End. on motion dated 6/15/74. Motion denied in accordance with memo decision filed herewith. Ward J. (mailed notice).
Jan. 22-74	Filed Memo Decision Order. The motion is denied as indicated. Ward J. (mailed notice).

DOCKET ENTRIES

DATE	
Jan. 23-74	Filed Reply Aff. by Barry H. Singer. Re: Summary Judgment.
Jan. 23-74	Filed deposition of pltff. Abraham Cohen on 9/30/70. (mailed notice).
Jan. 23-74	Filed continued deposition of pltff. Abraham Cohen on 5/11/71. (mailed notice).
Jan. 23-74	Filed continued deposition of pltff. Abraham Cohen on 6/27/72. (mailed notice).
Jan. 23-74	Filed continued deposition of pltff. Abraham Cohen on 8/28/72. (mailed notice)
Jan. 23-74	Filed continued deposition of pltff. Abraham Cohen on 12/6/73. (mailed notice).
Jan. 23-74	Filed Memo of Law by pltffs. in opposition of motion for summary judgment.
Jan. 23-74	Filed Reply Memorandum of Law by pltffs.
Jan. 23-74	Filed statement pursuant to rule 9(g) of

DOCKET ENTRIES

DATE	
	the Gen. rules of the USDC for the SDNY, responsive to the statement made by the moving defts.
Mar. 1-74	Filed Stip & Order that the time for defts. to answer pltffs. motion is adjourned to 3/8/74; & Pltffs. time to reply is adjourned to 3/12/74 and the ret. date of the motion is adjourned to 3/15/74 Ward. J.
March.7-74	Filed Affidavit in Opposition to Pltffs. Motion for Class Action Status by James G. Grady.
Mar. 8-74	Filed Memorandum in Opposition to Class Action Determination (Pltffs.)
Mar. 8-74	Filed Affidavit in Opposition to Pltffs. Motion for Class Action by Peter I. Feinberg. deft.
Mar. 14-74	Filed Rebuttal Affidavit by Barry H. Singer.
Mar. 13-74	Filed Pltffs. Notice of Motion. Re: Class Action. ret. 3/8/74

DOCKET ENTRIES

DATE	
Mar. 13-74	Filed Pltffs. Memorandum of Law.
Mar. 15-74	Filed Reply Memorandum in Support of Class Action Motion by Plaintiff.
Apr. 23-74	Filed Reply Affidavit on behalf of pltffs. supporting the Class Action.
Apr. 23-74	Filed Affidavit of pltffs. Counsel in response to opposing affidavits of defts. counsel by Ira Jay Sands.
Apr. 23-74	Filed Pltffs. Rebuttal Affidavit by Ira Jay Sands.
Apr. 22-74	Filed Memorandum Order. Pltffs. motion for an order determining that this action proceed as a class action is denied and the class action averments are stricken. Ward J. (mailed notice).

DOCKET ENTRIES

DATE	
Apr. 22-74	Filed Memo. End. on motion dated 3/13/74. Motion denied. in accordance with memorandum decision filed herewith. Ward J. (mailed notice).
May 28-74	Filed Pltffs. Notice of Appeal from order of 4/22/74. (mailed copies)
May 31-74	Filed Pltffs. Notice of Motion. Re: Extending time for filing Notice of Appeal. ret. 6/11/74.
May 31-74	Filed Affidavit in Opposition to Pltffs. motion to Exten.Time to appeal by James G. Grady.
June 3-74	Filed Affidavit by Barry H. Singer in opposition to pltffs. motion for extension of time to appeal.
June 3-74	Filed Reply Affidavit on behalf of pltffs. by Ira Jay Sands.
June 4-74	Filed Affidavit deft's (Lawson & Holland) in opposition to pltffs' motion for extension of time to file appeal.

DOCKET ENTRIES

DATE	
June 4-74	Filed Stip & Order adjourning motion for extension to file Notice of Appeal on 6/4/74. Ward J.
June 7-74	Filed Reply Affidavit on behalf of Pltffs. by Ira Jay Sands.
June 19-74	Filed Memo. End. on motion dtd. 5/31/74. Motion granted. The time for filing a notice of appeal from the order dtd. 4-22-74 is extended to 6-21-74. The foregoing does not constitute a determination by the Court that said order is appealable as of right. So Ordered Ward J. (mailed notice).
June 26-74	Filed certification of record on appeal.
July 11-74	Filed Undertaking for costs on appeal in the amt. of $250. by National Surety.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

ESTHER FRIEDLANDER and ABRAHAM COHEN on behalf of themselves and all other Purchasers of Limited Partnership Interests in DRAKE ASSOCIATES, similarly situated,

Plaintiffs,

-against-

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORPORATION, PETER I. FEINBERG SECURITIES CORP., AGRIN, LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants.

----------X

70 Civ. 2561

COMPLAINT

CLASS ACTION

Plaintiff Requests A Jury Trial

Plaintiffs, complaining of defendants by their attorneys, SANDS, GELLER & WEBB, allege upon information and belief, except as to paragraph 4, which is alleged on knowledge.

JURISDICTION AND VENUE

1. The causes of action arise under Section 17(a) of Securities Act of 1933, Section 10(b) of Securities Exchange Act of 1934, Rule 10b-5

thereunder; Section 352-c and 352-e of New York General Business Law, and Common Law.

2. Jurisdiction is based upon Section 22 (a) of the Securities Act of 1933 and Section 27 of Securities and Exchange Act of 1934, and pendente jurisdiction.

3. Defendants reside in, maintain offices in and inhabit the State of New York and are within jurisdiction of the Southern District of New York where the causes of action and transaction took place.

PLAINTIFF

4. The named plaintiffs are executors under last will of their father, Raphael Cohen, who was a purchaser of limited partnership securities in DRAKE ASSOCIATES, a New York limited partnership, ("Associates").

CLASS ACTION ALLEGATIONS

5. Plaintiffs brings this action on their own behalf and on behalf of a Class of Inves-

tors who likewise purchased the same limited partnership securities and were likewise damaged.

6. Members of the Class are numerous, being in excess of five hundred persons, located in various States, many unknown to named plaintiffs and unaware that causes of action on their behalf exists or have been brought and/or unaware of facts giving rise thereto. It is impracticable to bring them all before this Court. The named plaintiffs as knowledgeable and capable adults will fairly insure adequate representation of interests of all said purchasers of securities. They have no interests hostile to any members of the Class (except defendants, if a defendant is a member) since if plaintiffs are successful, the Class will be also plaintiffs, and undertake to represent the Class and their attorneys are experienced in securities litigations in this Court.

The violations are based upon the same written selling document and there are questions of law and fact common to the Class; as to whether the prospectus disseminated in the offering contained misleading

information and also failed to set forth information required in order to present a full and truthful statement as to dangers involved in the offering, and whether such matters violated the acts. Claims of the named plaintiff as Representative party are typical of claims of the Class. Reference to "plaintiff", shall mean the named plaintiffs and members of the Class. Plaintiffs know of no other action commenced with respect to these causes of action against the defendants.

DEFENDANTS

7. At all times herein, defendants and certain of them include the organizers, parents and promotors of Associates and they assisted and were associated therein and dominated and controlled its affairs and business. Associates was organized in or about, August, 1959, under New York laws for the purpose of purchasing for investment fee title to DRAKE HOTEL, at 440 Park Avenue in New York City. Defendants, PETER I. FEINBERG, SAMUEL SOKOL, LOUIS ADLER, MARVIN GREENSPAN and ALFRED KAPLAN, were its general partners. Defendants engaged in a fraudulent

course of conduct pursuant to a broad plan and scheme and did knowingly commit acts designed to knowingly defraud and deceive plaintiff and the Class and the public at large, with the sale of limited partnership interests in DRAKE ASSOCIATES.

8. Defendants, WILLIAM ZECKENDORF, as a participant in such plan and scheme, of the defendants herein to commit acts pursuant to such broad plan and scheme and by wanton and reckless course of conduct designed to defraud plaintiff herein and the public at large, through ZECKENDORF HOTELS CORPORATION, agreed to and did net lease the property and erect thereat an addition to the hotel. Defendant WILLIAM ZECKENDORF caused WEBB & KNAPP, INC., to guarantee the obligations of the tenant under the net lease. ZECKENDORF HOTELS CORPORATION had the right to assign the lease after three years but the guaranty of WEBB & KNAPP, INC., was to continue in full force and effect. WEBB & KNAPP, INC., had the right to repurchase the HOTEL DRAKE during the last six months of the tenth year of the initial term of the net lease.

9. Defendants, DOMAX SECURITIES CORPORATION and PETER I. FEINBERG SECURITIES CORP., acted as agents of Associates and conduit corporations for defendants.

These corporations were wholly owned by certain of the general partners, who through them sold to plaintiff and the public at large, securities in Associates and thereupon committed acts pursuant to a broad plan and scheme and wanton and reckless course of conduct designed to knowingly defraud plaintiff and the public at large with the sale of limited partnership Units in Associates through a written selling document, entitled "Prospectus", dated October 22, 1959.

10. At all times herein, defendants, AGRIN, LAWSON & HOLLAND, independent certified accountants, and HARRIS, KERR, FORSTER & COMPANY, independent public accountants, with offices in the Southern District of New York did knowingly commit acts pursuant to a broad conspiracy and wanton and reckless course of conduct knowingly designed to defraud plaintiff and the public at large and knew that plaintiff would read and would rely upon their projections and audits and would be deceived and damaged by any misrepresentations or misstatements therein and said defendants knew and should have known that they were violating their professional duties which they held out to plaintiff and to the public

at large.

11. At all time hereinbefore, said defendants engaged in a fraudulent course of conduct over a period of time and all records, documents, writings and memoranda which evidenced the fraud was solely within the control and custody of said defendants and plaintiff and members of the Class herein were not aware of such fraudulent activity by virtue of the control and secrecy exercised over these papers by certain defendants, until approximately one year prior to the commencement of this action when plaintiff was thus enabled to and did in fact discover such violative activities as are set forth in this complaint. During this period of time, plaintiff had no access to such writings in control of defendants and had no knowledge of the fraud perpetrated upon members of the Class which plaintiff Represents.

FIRST COURT

Violation of Section 17(a) of Securities Act of 1933 and Section 10(b) of Securities Exchange Act of 1934 and Rule 10 b-5 thereunder

12. In or about August, 1959, Associates was formed by and with assistance of defendants for the purpose of purchasing for investment fee title to the

COMPLAINT

DRAKE HOTEL, 440 Park Avenue, New York, New York. A nominee acting on behalf of defendants, PETER I. FEINBERG, SAMUEL SCHOOL* LOUIS ADLER and MARVIN GREEN-SPAN, had entered into a contract to acquire the DRAKE HOTEL from WEBB & KNAPP, INC., for the sum of $9,000,000.00, payable $4,500,000,000 in cash and $4,500,000.00 by taking title subject to an existing Consolidated Mortgage in like amount. In addition, the purchaser was required to make a loan of $1,000,000.00 to defendant, ZECKENDORF HOTELS CORPORATION, which loan would enure to benefit of Webb & Knapp, Inc. and was to be satisfied by construction of an additional structure to said hotel. The closing of title was scheduled for December 15, 1959, at which time, by assignment of the contract from said nominee, Associates did become the owner in fee of such land and buildings and owner of the furniture, furnishings and equipment thereof.

13. Beginning in or about August, 1959, and continuing in part until in or about the time this action was commenced, defendants engaged in and assisted each other in a secret continuing agreement, understanding, concert of action, plan, scheme and conspiracy to, and did, unlawfully, wilfully and knowingly, directly and

*SOKOL

indirectly, wantonly and recklessly defraud plaintiff and the public at large by making misrepresentations in the sale of such securities, to induce plaintiff and the public at large to furnish equity capital to Associates for use by various defendants to their own benefit, and in connection therewith caused and assisted in the issuance of a written selling document, entitled "Prospectus", dated October 22, 1959.

14. As part of said activities and knowing that plaintiff intended to rely upon said selling document, defendants did use and permit to be used by the general partners and by means and instruments of transportation and communication in interstate commerce and by use of mails: (a) employ devices, schemes and artifices to defraud; (b) obtain money by means of untrue statements of material facts necessary to make statements made, not misleading; and (c) engage in transactions, acts, practices and continuing courses of business which operated or would operate as a fraud or deceit upon plaintiff and members of the Class.

15. Defendants' statements created and made representations which they knew or should have known were beyond reasonable expectations or unwarranted by existing circumstances, inclusive of the following:

COMPLAINT

The "Prospectus" failed to concisely and lucidly state:

A. The real estate and financial experience of the general partners and promotors and defendants as operators of similar hotel properties;

B. The property had fair market value substantially less than the price to be paid by Associates and the amount of securities to be sold was far in excess of such fair market value of the real estate equity;

C. At the time of the Prospectus, there was planned increased competition from additional hotels in the area and substantial monies would be used for reinvestment in the property, rather than to Unit holders, in an attempt to keep a competitive position, by the net tenant, Zeckendorf Hotels Corporation;

D. The property needed substantial improvements and was not in a good condition and defendants overstated profits and understated expenses in their projections;

E. Projections did not allow sufficiently for legal fees, mortgage brokerage fees and other charges to be incurred in connection with future financings;

F. Labor conditions should anticipate substantial increases in the payroll and related expenses;

G. Details of the opinions set forth in the "Prospectus", that the building and property is in a good state of repair and that agreements amongst defendants were without armslength bargaining;

H. Commissions to be received by defendants and others in connection with the sale of securities and for other services;

I. A description of competitive buildings, rates, vacancies, anticipated construction and rates thereof;

J. Impact of vanishing tax shelters;

K. The nature of tests of accounting records and auditing procedures considered necessary by defendants and/or the accountants and so performed to satisfy that records presented were full and complete and applicable to future operations;

L. Defendants and/or their accountants were in no position to properly examine full and complete records to ascertain that they were presented on a basis consisting with the preceding fiscal years and would apply to future operations;

M. Although, the Prospectus stated the cash available for distribution to partners for the first year of operations, defendants knew or should have known that such distributions were not based upon reasonable projections over any prolonged period;

N. Defendants knew or should have known that the prospectus did omit and contained other untrue statements and material facts;

O. Defendants knew there would be no future public trading market of the securities and that such securities were not freely tradeable;

P. The experts in the Prospectus did not examine and investigate the accuracy and completeness of statements by defendants in the Prospectus and could not vouch for their accuracy and completeness. The experts made no independent examination of the property to verify correctness, accuracy and completeness of statements of financials submitted by defendants and if they had, they would have ascertained that the Prospectus was not proper;

Q. The experts had represented defendants and certain of them in other transactions and were not independent and could not represent Associates, while

still representing opposing parties in the same transaction and in fact, had a conflict of interests;

R. The general partners would devote only such time and attention to the business as they would deem advisable and upon a future default by the net tenant, they would not be in a position to properly operate the property;

S. Transactions with Associates would not be at arms-length and the general partners could not represent plaintiffs as their fiduciaries;

T. Defendants failed to afford the people emphasis in the Prospectus to the fact that Zeckendorf Hotels Corporation and Webb & Knapp, Inc. had for some years sold hotels and buildings to other real estate syndicators and had taken back for themselves a net lease obligation for a term of years at a rental in excess of the net income which defendants could reasonably anticipate would result from the operations of such property.

U. As a result of the aforesaid, Zeckendorf Hotels Corporation and Webb & Knapp, Inc. had sold each of said properties at a price far in excess of reasonable market value had it not been based upon anticipated income obligations from Zeckendorf Hotels Corporation and Webb & Knapp, Inc.

COMPLAINT

V. As a result of the aforesaid, Zeckendorf Hotels Corporation and Webb & Knapp, Inc. had in effect been borrowing sizable millions of dollars from said purchasers with said sums being required to be repaid in the form of monthly rental as net tenant of each of said buildings.

W. As a further result of the aforesaid, the monthly obligations under said numerous net leases by Zeckendorf Hotels Corporation and Webb & Knapp, Inc. had mounted and were continuing to mount to unmanageable proportions and continuation of the value of any of their said obligations was precarious.

X. In the event of default under that lease by Zeckendorf Hotels Corporation and/or Webb & Knapp, Inc., the general partners would be required to expend sizable sums of money in the operation of the premises and the projections and financials set forth in the Prospectus would no longer prevail and the safety and income from the investment would be precarious.

Y. In the event of such default, the general partners did not intend to devote their full time to the daily operation of said hotel property on behalf of and as fiduciaries for the investors

despite the biographies of defendants Sokol, Greenspan and Adler which detailed their substantial experience in the operation of hotels.

Z. Defendants had made no independent examination of the obligations of Zeckendorf Hotels Corporation or Webb & Knapp, Inc. and knew or had reasonable grounds to know that such financial problems as aforesaid, had already beset Zeckendorf Hotels Corporation and Webb & Knapp, Inc. with respect to previously sold and leased back properties.

AA. The defendants knew and should have known that the credit rating of Zeckendorf Hotels Corporation and Webb & Knapp, Inc. in the investment community was open to high question.

BB. Defendants knew and should have known that the price which they were causing Associates to pay for said property was in excess of it market value and was based solely upon the income in the net lease as guaranteed by Webb & Knapp, Inc.

CC. Defendants knew or should have known that Webb & Knapp, Inc. and Zeckendorf Hotels Corporation would be permitted to utilize monies received for the Drake Hotel and received from operations of the Drake Hotel for the support of other of their

net lease obligations on unrelated properties and they would thus be permitted to intermingle the income from the Drake Hotel and render the solvency of operation as precarious.

The Prospectus falsely stated amongst other things that:

(a) From 1965 through 1969, partnership taxable net income will increase from $357,217.00 to $612,688.00.

(b) In the event Webb & Knapp, Inc. does not exercise its option to purchase the hotel, the amount of taxable net income to the partnership will increase to 1972 in which year such income will exceed cash available for distribution to partners.

(c) The property will bring in additional revenues over and above those set forth in the financial statements contained in the Prospectus.

(d) The guarantee by Webb & Knapp, Inc. of the net lease for 10 years or until the net operating income shall reach $1,500,000 for two consecutive 12 month periods, whichever is earlier, should be given consideration.

(e) Other statements concerning the future income and growth of the property.

COMPLAINT

Defendants knew or should have known that the said statements and other statements contained in the Prospectus were false and misleading, particularly since defendants knew and should have known that Webb & Knapp, Inc. and Zeckendorf Hotels Corporation were not able to fulfull their financial obligations undertaken by them in connection with other similar real estate ventures, and further that Webb & Knapp, Inc. and Zeckendorf Hotels Corporation would be in a position to utilize monies received from the transaction herein and from operation of the Drake Hotel, for the benefit of outside enterprises, all thus rendering the statements herein contained as incapable of fulfillment.

16. As a result of defendants' said acts, plaintiffs and members of the Class purchased securities from and through defendants, which securities at time of purchase had actual value far less than the purchase price thereof as defendants knew and as a result, plaintiffs and members of the Class have been damaged thereby.

SECOND COUNT

Violations of Sections 352-c and 352-e of the General Business Law of New York and Regulations Thereunder

17. Plaintiffs reallege each allegation herein-

before set forth.

18. Said conduct by defendants did cause violations of the New York General Business Law, Section 352-c and Regulations thereunder and did damage plaintiffs and members of the Class thereby.

19. The material misstatements and omissions to state material facts as alleged, resulted in defendants failing to meet requirements of Section 352-e of the New York General Business Law and Regulations thereunder and did damage plaintiffs and members of the Class thereby.

THIRD COUNT

Violations of Common Law

20. Plaintiffs reallege each allegation hereinbefore set forth.

21. Said conduct by defendants as alleged, was a breach of a fiduciary duty to plaintiffs and to every member of the public who bought said securities and such conduct was violative of requirements of Common Law and damages has been sustained by plaintiffs and members of the Class thereby.

22. Defendants did knowingly make various representations in said "Prospectus" and said representations were false and misleading to the knowledge of defendants and defendants did know that they did not intend

to fulfill the undertakings and obligations to plaintiffs and the Class which were required of them by their dealings and agreements hereinbefore described.

23. Defendants knew or should have known that plaintiffs and members of the Class would rely on such representations and agreements and if not for the falsity of the representations therein, they would not have been damaged thereby and would not have purchased said securities.

24. Said conduct was gross, willful, malicious and wanton and intentionally calculated by defendants to cause damage to the public and was part of an overall course of reckless conduct aimed at the public-at-large, without regard to business ethics or morals required when dealing with members of the public.

25. Defendants conduct evinced a high moral culpability and an intent to defraud.

26. Plaintiffs seek damages in an amount to compensate for said damages and also, punitive and exemplary damages from defendants in the amount of

Five Million ($5,000,000.00) Dollars.

WHEREFORE, plaintiffs demand judgement that:

(a) The rights to be determined of the plaintiffs and all members of the Class of purchasers of securities of DRAKE ASSOCIATES, similarly situated;

(b) This Court decree that plaintiffs and each member of the Class recover from defendants all sums paid by them for said securities, together with interest from the date of each plaintiff's respective purchase and all other losses and damages sustained as a result of the actions by defendants and their failure to fulfill their undertakings and obligations to plaintiffs and members of the Class and plaintiffs and the Class have judgment therefore; and for such other and further relief as to this Court may seem just and proper;

(c) Plaintiffs and the members of the Class be awarded punitive and exemplary damages of Five Million ($5,000,000.00) Dollars;

(d) Plaintiffs and members of the Class be awarded damages as determined and expenses, costs and disbursements incident to prosecution of this action, including reasonable counsel and accounting fees;

(e) The Court determine this action to be a Class Action and authorize the giving of appropriate notice to members of the Class.

(Sgd) SANDS, GELLER & WEBB
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701 Seventh Avenue
New York, New York 10036
(212) COlumbus 5-3500

COMPLAINT

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

ABRAHAM COHEN, being duly sworn, deposes and says that deponent is the Plaintiff in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, deponent believes it to be true.

(Sgd.) Abraham Cohen
ABRAHAM COHEN

Sworn to before me this
17th day of June, 1970.

By James A. Geller

NOTICE OF MOTION FOR CLASS DETERMINATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER FRIEDLANDER, etc. Plaintiffs, -against- PETER I. FEINBERG, et al. Defendants.	70 Civ. 3561 (RJW) MOTION PURSUANT TO RULE 23, Fed R. CIV. P.

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of IRA JAY SANDS, sworn to February 19, 1974 with exhibits attached, and the pleadings and proceedings herein, plaintiffs will move this Court before Honorable Judge Ward, at Chambers at the United States Courthouse, 40 Centre Street, City and State of New York, on March 8, 1974, at 10:00 a.m. for an order pursuant to Fed. R. Civ. P. 23(b)(1)(A) and/or 23(b)(3), designating this action as a class action on behalf of all persons who have purchased limited partnership interests of Drake Associates after receiving a prospectus dated October 22, 1959 and sustained damage.

Dated: New York, N. Y.
February 19, 1974

IRA JAY SANDS

By: Ira Sands
Attorney for Plaintiff
Office & P.O. Address
701 Seventh Avenue
New York, N. Y. 10036

(212) 265-3500

AFFIDAVIT OF IRA JAY SANDS IN SUPPORT OF RULE 23 MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER FRIEDLANDER, etc., Plaintiffs, -against- PETER I. FEINBERG, et al., Defendants.	70 Civ. 2561 (RJW) AFFIDAVIT IN SUPPORT OF RULE 23 MOTION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

IRA JAY SANDS, being duly sworn, deposes and says:

1. I am the attorney for plaintiffs. Since the filing of the complaint and until last year, this matter was handled at my office entirely by Robert Levin, Esq. who has removed. This affidavit had in large part been factually drafted by Mr. Levin as an affidavit for himself, since this motion was to be made by plaintiffs much earlier, but for the threshhold motion for summary judgment which defendants have long been planning to serve and but for the Bankruptcy Court restraining order, both hereinafter described under Section Two hereof. The facts herein are thus taken by me in part from the files and from Mr. Levin's affidavit.

2. Plaintiffs move pursuant to Rule 23, Fed. R. Civ. P. 23(b)(1)(A) and/or 23(b)(3) for an order designating

the action as a class action, and providing that upon granting the motion, that Notice To The Class be submitted to the Court for its approval and direction.

3. This affidavit is in two sections. The First concerns itself with the reasons why this action should be designated as a class action. The Second concerns itself with the reasons why this class action motion could not, in fact and by law, be made at an earlier date, as claimed by the Feinberg defendants.

SECTION ONE
THIS ACTION SHOULD BE DESIGNATED AS A CLASS ACTION

4. Plaintiffs sue on behalf of all similarly situated, alleging violations of Section 17(a) of the 1933 Securities Act, Section 10(b) of the 1934 Securities Act, Rule 10b-5, Sections 352-c and 352-e of the New York General Business Law and common law.

5. Plaintiffs are co-executors of the estate of their father, Raphael Cohen, deceased, who during his lifetime purchased a limited partnership unit issued by Drake Associates, a New York limited partnership, pursuant to a misleading prospectus dated October 22, 1959 and filed with the SEC.

6. Drake Associates, in which Feinberg, Sokol, Adler, Greenspan and Kaplan are general partners, was organized August, 1959 to purchase title to Hotel Drake,

located at 56th and Park Avenue in New York City as an investment inclusive of land, buildings, furniture, furnishings and equipment. A registration statement was filed with the SEC August 20, 1959 offering $5,905,000 of units. It became effective October 22, 1959. A unit was priced at $10,000. A copy of the prospectus is annexed as Exhibit "A".

7. Also named as defendants are the auditors who certified the financial statements contained in the prospectus, and (a) the seller of the property purchased by the limited partnership, (b) the lessee and operator of the property, (c) the guarantor of performance by the lessee (a, b, c were Zeckendorf entities) and (d) certain affiliated broker-dealers through whom the securities were publicly sold.

8. The prospectus was widely disseminated. Many syndicate broker-dealers and others assisted in the offering. Every limited partner received the prospectus, as indicated by paragraph "4" of the written Offer To Purchase, which the General Partners required every purchaser to execute (Ex. "B"):

> "4. I hereby acknowledge and represent as follows:
>
> "(a) I have received the Prospectus of Drake Associates pertaining to an offering of $5,905,000. of limited Partnership Interests therein, and I am familiar with the terms of said offering.

"(b) In executing this offer, I am relying solely on the aforesaid Prospectus and upon no other statement whatever, written or oral."

9. Paragraph 15 of the Complaint sets forth 33 specifications wherein the Prospectus failed by misrepresentation or omission, to state facts sufficient to make the statements made, in light in which they were made, not misleading. These specifications include:

(a) Zeckendorf Hotels Corporation and Webb & Knapp, Inc., as sellers and as new net tenants of Drake Hotel ("Sellers-Tenants") had at the time of this deal sold hotels and real estate to other syndicators so as to obtain direly needed cash. As an inducement in the Hotel Drake deal defendants had negotiated a long term net-lease-back obligation requiring the sellers-tenants to make payment of monthly rent and charges in excess of the net income which defendants could reasonably anticipate would be generated from operation of Hotel Drake;

(b) The general partners purchased the Drake Hotel property from the Zeckendorf sellers-tenants, at a price in excess of its reasonable market value through false statements of inflated income and earnings to be derived from the operations of the Hotel by the Zeckendorf net tenant.

(c) Sellers-tenants had devised and frequently used a modus operandi whereby they would in effect "borrow"

millions of dollars through selling (primarily to syndicators) their properties at inflated prices and in effect repaying this excessive price by a higher monthly or quarterly rental, as net-tenant operating the property. This gave the syndicator a high monthly income with which to entice investors to purchase the limited partnership units, but far higher than it should have been based on its true operation;

(d) The modus operandi had the ultimate effect of seriously diluting and impairing the long-term financial condition of sellers-tenants. They were compelled to, and were constantly negotiating additional realty sale-leaseback arrangements at net leases also having rental obligations in excess of reasonable earnings from operation of the properties sold, thus, requiring more cash flow by the tenant and getting deeper into debt. Each new net lease at an excess rental payment over reasonably projected income made their overall financial burden more acute and the quality of their Drake obligations more suspect.

The potential default on the numerous net lease obligations of the stretched-thin Zeckendorf rubber band was a very real risk that was never adequately explained to the limited partners;

(e) The general partners of Drake Associates and their affiliates made no independent examination or verific-

ation of the financial condition and credit rating of the net tenant. Furthermore, the Underwriter, as owned and controlled by the general partners, was a sham and did not properly undertake and fulfill its due diligence investigations, requirements and obligations to the public investors. This was never disclosed;

(f) Since the general partners promoted and sold on the basis of their lengthy experience and sophistication in successful real estate transactions, they knew and should have known of activities and financial difficulties of the Zeckendorf group, with respect to other rental obligations on other sale-leaseback arrangements. If they made no or little investigation, they should have so disclosed it rather than create the trustee impression of proper discharge of their fiduciary duties;

(g) Sellers-tenants needed and used the funds received from the sale-leaseback with Drake Associates for support of other net lease obligations and did intermingle revenues derived from operations of Drake Hotel with funds from other Zeckendorf entities. They thereby impaired the solvency and success of the Drake net lease agreement;

(h) The statements of income and expense for Drake Hotel as set forth in the Prospectus were false and inaccurate and should have contained suitable caveats for the future, so that unsophisticated public syndicate in-

vestors would obtain a more realistic appraisal of the risks inherent in the venture.

10. To summarize the problems which developed after the $5,905,000 of limited partnership securities were sold:

a) a Zeckendorf - Webb & Knapp entity became net tenant of Drake Hotel and lost money on its operation;

b) the financial structure of the Drake venture as described in the prospectus was never attained either by Zeckendorf or anyone else;

c) after a period of Zeckendorf operations, its net tenant fell apart. The general partners caused the syndicate itself to take over. It too lost money because

i) income was less than stated in the prospectus

ii) expenses were greater than stated

iii) the guarantee was worthless

d) thereafter, the general partners, still retaining their own earlier promotors benefits and reaping more as time went on, caused Drake Hotel to be sold at a loss and a mortgage taken back by Drake Associates.

11. Some investors sold their unit at capital loss after Zeckendorf defaulted. They received back much less than invested. They also lost any other benefits to which they may later have become entitled. Any difference among investors relates only to how much each was damaged.

12. The questions of the fact are common for each class member who bought after receiving the same prospectus, i.e. facts of prospectus omissions and misrepresentations. The questions of law are common, i.e. federal jurisdiction, fiduciary, materiality, Statute of Limitations, tolling, and whether the omissions and misrepresentations in the one written document were violative. Plaintiffs and all class members will prevail together or lose together.

13. Plaintiffs have no interests antagonistic to other members of the class. If plaintiffs prevail, so do other class members, since the questions of fact in issue are identical and arise from the identical written prospectus of Drake Associates. It is estimated that the class consists of approximately 900 or so members residing mainly in New York and Florida, with others dispersed. Drake Associates records should be able to identify them, since the class is limited to those who became purchasers after receiving the prospectus effective October 22, 1959. There certainly are too many members to intervene them or to allow individual actions or possible divergent findings. The one written prospectus situation here presents a classic case for class determination.

14. Plaintiff Abraham Cohen was until his recent retirement, a career senior executive Group Chief with the U.S. Customs Department. His sister, plaintiff Friedlander, is a housewife. They represent their late father's estate and will properly represent the class. The industry and devoted activities

of Abraham Cohen and Esther Friedlander in representing a class of defrauded investors has already been demonstrated, not only in Mr. Cohen's active participation in this case but proven by a substantial recovery for the Cohen class of syndicate investors in another similar syndicate fraud action. Pending for a number of years and settled in 1973 was a class action involving property at 52 Broadway in New York City, the syndicator having been Jerry M. Tenney and Omega Equities Corporation. After a long course of heavily contested pre-trial procedures, motions, hearings etc., a global settlement was hammered out providing a six figure valued (cash, stock, assets) recovery (Cohen vs. Tenney, 67 Civ. No. 4187 (HRT). Judge Tyler designated me as co-trustee to determine the accuracy of proofs of claim and to oversee distribution of settlement proceeds.

15. To further indicate adequacy of representation here, I trust I will be pardoned a breach of modesty in discussing some matters in which my clients have prevailed. Over a period of many years, I have been counsel, co-counsel, lead counsel, general or supervising counsel, etc. in actions alleging violations of federal securities acts, which ultimately resulted in numerous settlements and benefits to shareholders (some multimillion, some million dollar plus and some lesser). I have been plaintiffs' said counsel in actions involving classes defrauded in similar limited partnership securities matters, as above described. The practice

of my office is limited to securities litigations. I am experienced in real estate and hotel operations. I have been designated as general, lead and/or class counsel by numerous Judges of this Court. I am presently providing such services in actions not yet disposed of, together with the assistance of my sizeable supportive office staff. I have acted in equivalent capacity with respect to securities derivative actions in Courts around the country. I attach as Exhibit "C" a partial list of some completed matters.

SECTION TWO

THE DELAY IN MAKING THIS MOTION WAS PROPER

16. There were two major delaying factors validly placed by defendants.

1) Bankruptcy Court restraining order.

2) Motion for Summary Judgment on the threshold question of Statute of Limitations and defendants' discovery preference for that motion, plus later Court direction for that motion to receive preference.

17. Upon commencement of the action, plaintiffs attempted to commence initial discovery of defendants including William Zeckendorf and his entity. Plaintiffs were promptly informed by letters dated August 5, 1970 and August 24, 1970 and phone calls from counsel to Zeckendorf of the broad wording and stifling effect of

a restraining order of Referee Herzog. (Exhibits "E" and "F"). It was made abundantly clear that not only did the Order restrain actions against Zeckendorf but that so long as they involved Zeckendorf they could not even continue "around" him. His counsel Robert Loeffler, Esq. was properly protective.

18. The Court's attention is called to the handwritten note at the foot of Exhibit "E" wherein the attorney in my office handling the matter wished to have me review the August 5, 1970 letter and the effect of restraining order. Our determination to move the action forward resulted in the letter of August 17, 1970 (Exhibit "G") wherein my office took the position that we would take no further action against Mr. Zeckendorf until the conclusion of the Chapter 11, but that "we intend to proceed against all other named defendants in said action".

19. Exhibit "F" followed in return from Mr. Loeffler to my office in which there was clear and unequivocable language from the attorney who had been involved with the Zeckendorf problems, that we were enjoined from taking any steps in the entire action because Mr. Zeckendorf was named as a defendant "whether those steps involved Mr. Zeckendorf, another defendant or anyone else". The reason for the broadness of the restraining order, as given in Mr. Loeffler's August 24 letter, were logical, reasonable and correct. I am told that this was confirmed by telephone communication with Referee Herzog's chambers.

20. Thereafter the restraining order was carefully approached from a point of view of walking a tight rope. The matter was discussed at various times. The approach was to do nothing to violate it but to try to move the case ahead if possible, in certain respects. In that way, over a long period, many sessions of extensive oral depositions were permitted of plaintiff Cohen to supply the Feinberg defendants with the discovery they demanded (and documentation) to permit them to prepare their summary judgment motion. I am informed that the position was taken that since such a motion could perhaps aid one or more defendants, the defendants' discovery for it could not prejudice Mr. Loeffler who could read the depositions and if he found glaring omissions, he could later move for written interrogatories to Mr. Cohen or further deposition.

21. In the meantime, I obtained whatever private document discovery I could locate, from realty syndicate broker firms and from SEC filings of Drake Associates.

22. About May 1973, after counsel consultation, notices of deposition and document demands by plaintiffs were served. Mr. Loeffler responded on May 11, 1973, reemphasizing the Referee Herzog restraining order which certainly would apply to any class motion by plaintiffs. We felt that discoveries on matters of an interim nature such as statute of limitations facts could be caught up with by Zeckendorf and would in no way improperly bind him. Further, we had discussed the fact that the closing posture of his Chapter 11 would probably no longer require the restraint. Of course, to the contrary, we well realized that for a class

motion, the difference would be substantial. In his May 11, 1973 response Mr. Loeffler was firm. A copy is annexed as Exhibit "G". This matter has already been discussed at a pre-trial meeting before Judge Ward where the posture was considered that the Zeckendorf re-organization had progressed to the point where the restraining order was no longer essential.

23. On May 15, 1973 I responded to Mr. Loeffler and pointed out that after the conference before the Court, in view of the status of the Zeckendorf proceedings, I now felt that "we were no longer handicapped by being able to move with respect to the Zeckendorf interest. This was one of the earlier problems in movement of the case..." I added that because the defendants were now about to make their long delayed motion for summary judgment based upon Statute of Limitations, I would require discovery to defend against that motion.

24. On May 22, 1973 I wrote to Judge Ward and referred to the Zeckendorf proceeding and my correspondence with Mr. Loeffler. Exhibit "I".

25. On May 23, 1973 I conversed with Mr. Loeffler concerning the documents which I wished to examine relative to defending against the motion for summary judgment. Mr. Loeffler kindly consented to no longer stand behind the restraining order of Referee Herzog. Again from the tenor of Mr. Loeffler's letter, it can be seen that he too recognized my impatience at the delays and my desire to move the case forward. Exhibit "J".

26. Nevertheless even as late of May 1973, Mr. Loeffler sought a necessary postponement of discovery of his client. I refer to this in my letter of May 22, 1973 to Paul Z. Lewis, Esq., of Messrs. Pollack and Singer, Exhibit "K", which letter ties in with the next point that I wish to bring to the Court's attention.

27. From 1970 through 1973, the Feinberg defendants were repeatedly crying their desire to move for summary judgment upon the Statute of Limitations question. Soon after the action was commenced, when the question was orally raised by telephone, both sides evidentally researched the law and conferred by phone. Their views were irreconcilable, based not so much upon case law but upon the evaluation of the facts involved in the case.

28. Exhibit "K", my letter to Mr. Lewis of May 22, 1973 was one in a long series where I urged these defendants to serve their papers on their motion for summary judgment so that we could move the case along.

29. In 1970, the usual numerous litigative extensions of time were professionally granted amongst counsel. Conferences concerning Statute of Limitations were held between counsel as early as mid-1970. Attempts were made to agree to the acceptance of stipulated facts for purposes of Statute of Limitations which all recognized was a threshold problem upon which the case would turn. The Zeckendorf restraining order was not considered by the Feinberg defendants as restrictive of their motion rights

for their own individual benefit. Although, I was not convinced I felt that that approach would not jeopardize the plaintiffs.

30. The scheduling of the many sessions of the deposition of Abraham Cohen resulted in abundant delay due in substantial part to illnesses of the attorneys for various parties, conflict by the attorneys with other scheduled matters, illness of Mr. Cohen, duties of Mr. Cohen as a group chief for the Customs Department (frequently out of town) and in substantial part to the fact that the Feinberg defendants insisted upon production of documents belonging to the estate which were not readily available and which in part were obviously not pertinent to the Statute of Limitations question but requested solely for delay and harassment. There are a sheaf of letters, mainly from defendants, concerning the deposition dates. Mr. Cohen appeared on four separate occasions and produced a ledger book and other writings.

31. On more than one occasion, the defendants were asked whether they did not already have enough to make their motion for summary judgment. On August 17, 1972, I wrote to Feinbergs' attorneys in which I stated that they have been speaking about making the threshold motion "for quite some time now". Although I had no reason to doubt their intention, I was wondering how soon they were going to make the motion without further delaying the matter because this was such a threshold question of the entire case. Exhibit "L".

32. In fact on May 26, 1972, Mr. Levin of my office wrote to the Feinberg attorneys commenting that with respect to the next session of deposition of Abraham Cohen on June 27, 1972, it was hoped that defendants would "expeditiously make your motion for summary judgment". Mr. Levin continued that the defendants knew that plaintiffs had refrained from moving pursuant to Rule 23 for class determination pending decision on the summary judgment motion. Exhibit "M". Unfortunately this letter like its predecessor and like the telephone conversations in the interim did not produce the summary judgment motion until a year later.

33. In early spring 1973, a pre-trial conference was held before Judge Ward. At that time, Judge Ward gave the Feinberg defendants a deadline by which to file the motion or be restricted from making such a motion (reserving the defense for trial). My request for permission to file the class action motion as my request for plaintiffs discovery-in-chief were shunted on to a side track in the interim, because the Feinberg defendants undertook to expeditiously serve their summary judgment motion and since they accurately emphasized that the summary judgment motion was a threshold question to the entire case.

34. At that spring pre-trial conference, Judge Ward indicated that the status of the Zeckendorf reorganization was such that it may be likely that the protection to Zeckendorf of the restraining order would no longer be needed. I stated that I would immediately communicate that to Mr. Loeffler, as above described.

35. Yet no motion papers were served. On April 23, 1973 I wrote to the Feinberg attorney, Mr. Lewis. I said in part:

> "Are you going to make your motion for dismissal, based upon the Statute of Limitations, or are you not. This motion has been a very long time in the making and as has been repeated, the last time before Judge Ward, the motion forms the very basis of procedures to be followed in this case."
>
> "Not only will I personally appreciate your finally making this motion, but I think that you are now being put to the test of making it or not making it. The years have passed quickly since the motion was first discussed."

36. During the depositions sessions of plaintiff Cohen in 1971 and 1972, 64 exhibits (almost all consisting of numerous pages) had been introduced. Defendants had served the voluminous repetitive interrogatories which were responded to about April 1973.

37. The pre-trial conference scheduled for May 18, 1973 was adjourned because of an unfortunate accident to the wife of one of the attorneys for a defendant. In my letter to that attorney (Exhiibit "N") of May 10, 1973, I again referred to the long pending motion. I said that "the defendants have been undertaking to make this motion for a couple of years..." After further discussing the motion, I continued that "...even recently, I have been asking Messrs. Pollack and Singer whether they will make the motion, and if so to please make it early so that I can have time to respond and move on with the case."

38. In my footnote to Exhibit "N", I referred to reasons why I had been pushing defendants continuously to inform me whether they were going to make the motion and if so to move rapidly. Among

the reasons were that because of their motion, depositions of Mr. Cohen had taken preference and I had been unable to make any discovery.

> "I also wish to make the class action motion, particularly now that I am no longer under a disability because of the Zeckendorf bankruptcy. At the last pre-trial conference, the Judge suggested that the class action motion await the determination of the statute of limitations dismissal motion."

39. Judge Ward had set May 11 for service of summary judgment motion papers. He set a pre-trial date for May 18. On May 7, I wrote to Feinberg's attorneys (Exhibit "O") requesting that they tell me whether they intend to make the summary judgment motion "since as you know, I have been a long time in waiting for the opportunity to make the necessary class action motion, and even recently, Judge Ward clearly indicated that your Motion to Dismiss should take preference in time to the class action motion."

40. As a result of request by a defendant, the date of defendants to move to dismiss was extended again from May 11 to May 25, 1973. Yet on May 31, 1973, the Feinberg attorneys wrote to the Court that they could not comply with the deadline but would do so by June 8.

41. On June 4, after having received Feinberg's attorneys' said letter of May 31, 1973, I wrote to the Court (Exhibit "P") that defendants had enjoyed a number of years to prepare their motion and that I had been requesting early service of the motion papers to permit me to move the case ahead.

42. Plaintiffs have always believed that the defense of Statute of Limiations was factually tenuous at the most. Although we had tried to convince the Feinberg defendants of the apparent futility of such a motion because of "tolling due to secretion by the fiduciary" and other factual questions, we never denied that defendants had the right to make such a threshold motion and that all would be benefited by getting this issue out of the way early, if possible, especially during the "hold" period of the restraining order.

43. Although Rule 23 seeks promptness in the making of a class motion and although Local Court Rule 11A requires the motion be made within 60 days after filing the class complaint, the Zeckendorf restraining order, the threshold motion to dismiss and the directions of Judge Ward from and after the first pre-trial conference, were each adequate and necessary reasons for the class motion to have been delayed.

44. Of course, it is to be noted that subdivision (d) of Local Rule 11A would require the defendants to move within 30 days to dismiss the class allegations, in the event plaintiff had failed to make his motion within the 60 days prescribed in subdivision (c). In our action, no party moved. It cannot be denied that plaintiffs and the Feinberg defendants recognized the latent factors mandating the delays.

45. In or about September 1970, when the Zeckendorf attorneys had made it quite clear that plaintiffs must be restrained

from forward movement until the lifting of the restraining order, plaintiffs sought to commence a proceeding in Supreme Court, New York County against certain Feinberg defendants. Essentially after preparation of copious papers, the Feinberg defendants prevailed in Supreme Court upon their argument that relief could not be granted in that Supreme Court proceeding because of pendency of this Federal Court action.

46. It is evident that the delay in moving for class determination herein was the result of circumstances of the case not placed there by plaintiffs but rather of a combination of facts involving the defendants.

47. It is further evident that we have one of those factual situations where class determination could not reasonably and in a practical manner by sought before now, i.e. bankruptcy restraining order, threshold motion re Statute of Limitations, and Judge Wards practical approach in early 1973 that defendants should forthwith make their summary judgment motion while plaintiffs' discovery and class determination abide that event.

48. Therefore, it is unjust to hear any defendant cry out that plaintiffs should be denied their normal litigative rights to class determination and to proper discovery because this is now an "old case". Defendants took firm positions which have caused it to be an old case. Defendants could have waived use of the bankruptcy restraining order. Defendants could have made their motion for summary judgment early, before their discovery. If not for the

restraining order and even with the threshold question of Statute of Limitations open, plaintiffs could have made their class motion (although the preferable way was not to do so). The parties could have then requested the Court to hold up determination of class until the Statute of Limitations question had been completed.

49. However, direct use by certain defendants of the all-encompassing-restraining-order to prevent plaintiffs' movement, is not something which defendants in good taste should now use to claim that plaintiffs did not timely move for class determination or discovery.

50. Without class determination, this action would be finally dismissed without further movement. Damages to the Cohen Estate are certainly too small to financially permit the Executors to prosecute the action on their own behalf alone. The long and complicated road ahead requires legal devotion in a complex securities action for which the Estate could not compensate counsel out of any recovery to the estate. The only hope of recovery for the Estate would be by class action. Should class action determination be denied, it would spell the "Death Knell" of this action.

51. It would also prevent the possibility that the many hundreds of limited partners of Drake Associates could ever recover their damages, as did the many hundreds of limited partners in the recently settled Cohen vs. Tenney, supra, where these Cohen executors prevailed.

WHEREFORE, it is respectfully prayed that this motion pursuant to Rule 23 of the Federal Rules of Civil Procedure, be granted and this action be determined to be a class action on behalf of all persons who purchased limited partnership units in Drake Associates after receiving the prospectus of Drake Associates, dated October 22, 1959, and were damaged thereby, excluding any defendant who may also have othewise been a member of said class.

IRA JAY SANDS

Sworn to before me
this 19th day of February, 1974.

Notary Public

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In the Matter

of

WILLIAM ZECKENDORF, a/k/a
WILLIAM ZECKENDORF, SR.,

Debtor.

In Proceedings for an Arrangement

68 B 750

RESTRAINING ORDER

----------x

At New York, in said District, on the 29th day of August, 1968

Upon the annexed application of the above named debtor, dated the 27th day of August, 1968, and it appearing that no notice need be given, and sufficient cause having been shown therefor, and no adverse interest having been represented, it is

ORDERED, that any and all persons be and they hereby are stayed, restrained and enjoined from proceeding in any Court wherein the above named debtor is a defendant until final decree in the above entitled proceedings or until further order of this Court; and it is further

ORDERED, that all persons, firms and corporations, including all creditors of the above named debtor and the representatives, agents, attorneys and servants of all

EXHIBIT "D"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

such creditors and all sheriffs, marshals and other officers and their deputies, representatives and servants, are hereby jointly and severally enjoined and stayed from removing, transferring, disposing of, or attempting to in any way remove, transfer or dispose of, or in any way interfere with any property, assets or effects in the possession of or owned by the above named debtor, and in the possession of any officers, agents, attorneys or representatives of said debtor; and all said persons are further enjoined, stayed and restrained from executing, issuing or causing the execution or issuance out of any Court of any writ, process, summons, attachment, replevin, execution or any other proceeding for the purpose of impounding or taking possession or interfering with any property owned by or in the possession of said debtor or his agents servants or attorneys; and each and all of said persons, firms or corporations having process against the said debtor are hereby jointly and severally restrained, stayed and enjoined from taking any steps, measures or proceedings or doing any act or thing in any action wherein the said debtor may be either plaintiff, defendant, petitioner or respondent, and from causing, procuring, suffering or permitting the same to be done, until further order of this Court; except that the provisions herein shall not apply to a suit to enforce a lien upon the property of said debtor. Debtor's employer shall continue to make deductions from debtor's salary pursuant to existing income execution and hold same until further order of this court.

/s/ ASA S. HERZOG
Referee in Bankruptcy

A-58

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

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August 5, 1970

Robert B. Levin, Esq.
Sands, Geller & Webb
701 Seventh Avenue
New York, New York

Friedlander v. Feinberg, et al.

Dear Mr. Levin:

As I told you by telephone today, the undersigned represents William Zeckendorf, a defendant in the above action.

I am enclosing for your information, as promised, a copy of a restraining order dated August 29, 1968 issued by Referee Herzog staying all actions and proceedings against William Zeckendorf, which order was entered in connection with the Chapter XI proceeding involving Mr. Zeckendorf personally.

This letter will confirm that, while you have a chance to study the enclosed order and assess its effect on your action, the time of defendant William Zeckendorf to move or answer with respect to the complaint in the above action shall be adjourned from August 5 to September 4, 1970. In order that I may have a complete file, would you kindly sign the enclosed copy of this letter and return it to me in the envelope provided.

Sincerely,

Robert L. Laufer

Robert L. Laufer

RLL:sk
Encls.

Final version - RLL

Exhibit "g"

A-59

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

PAUL, WEISS, GOLDBERG, RIFKIND, WHARTON & GARRISON
345 PARK AVENUE
TELEPHONE (212) 838-3000

NEW YORK, N.Y. 10022
CABLE LONGSIGHT, N.Y.
TELEX 12-7831

WASHINGTON OFFICE
1775 K STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE (202) 293-6370
CABLE LONGSIGHT WASHINGTON

RANDOLPH E. PAUL (1946-1956)
LOUIS S. WEISS (1927-1950)

JOHN F. WHARTON
ROBERT E. SAMUELS
COUNSEL

ARTHUR J. GOLDBERG
SIMON H. RIFKIND
LLOYD K. GARRISON
HOWARD A. SEITZ
ADRIAN W. DEWIND
RAMSEY CLARK
HORRIS B. ABRAM
NORDECAI ROCHLIN
PAUL J. NEWLON
JOSEPH B. ISEMAN
JAMES B. LEWIS
THEODORE C. SORENSEN
MARTIN KLEINBARD
RICHARD M. PAUL
NORMAN ZELENKO
JOHN E. MASSENGALE
JAY H. TOPKIS
EDWARD N. COSTIKYAN
ROBERT H. MONTGOMERY, JR.
JOHN C. TAYLOR, 3RD
BERNARD H. GREENE
ERNEST RUBENSTEIN
ALLAN B ECKER
STUART ROBINOWITZ
JAMES L. PURCELL
ARTHUR KALISH
DAVID T. WASHBURN
BERNARD FINKELSTEIN
ARTHUR L. LIMAN
RICHARD R. DAVIDSON
SEYMOUR HERTZ
WALTER F. LEINHARDT
GERALD D. STERN
ANTHONY B. KUKLIN
MARTIN LONDON
DAVID C. BRODHEAD
PETER R. HAJE
LEONARD V. QUIGLEY
ALLAN BLUMSTEIN
NEALE M. ALBERT
JAY GREENFIELD
KEVIN J. O'BRIEN
ALFRED D. YOUNGWOOD
DONALD F. MOORE

WRITER'S DIRECT DIAL NUMBER
935-8986

August 24, 1970

Robert B. Levin, Esq.
Sands, Zeller and Webb
701 Seventh Avenue
New York, New York 10036

Friedlander v. Feinberg, et al.

Dear Mr. Levin:

I have your letter of August 17.

As you no doubt noticed, the language of the restraining order with respect to Mr. Zeckendorf goes beyond merely restraining proceedings against him as a defendant. Rather, the order, as we read it, enjoins any steps in any action in which Mr. Zeckendorf is named as a defendant, whether those steps involve Mr. Zeckendorf, another defendant or anyone else. I believe you will agree that such a broad injunction is necessary, since any steps in an action in which Mr. Zeckendorf is named as a defendant, whether those steps involve him or not, would raise serious questions as to whether the results were binding on, or useable by, Mr. Zeckendorf.

As a result of the broad scope of the restraining order, it appears to us that the only way you may avoid the effect of the order while continuing to prosecute the action against the remaining defendants, as you wish to do, is to agree at this time to discontinue the action against Mr. Zeckendorf. Of course, such discontinuance would be without prejudice to your rights to reinstitute the action against him at a future date.

We suggest this course of action as the only reasonable one at this time, from both our points of view, and we await some word from you on the matter.

Very truly yours,

Robert L. Laufer

RLL:sk

EXHIBIT "F"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

August 17, 1970

Paul, Weiss, Goldberg, Rifkind
Wharton & Garrison, Esqs.
345 Park Avenue
New York, N.Y. 10022

Re: Friedlander v. Feinberg, et al.

Att: Robert L. Laufer, Esq.

Dear Mr. Laufer:

This will confirm receipt of your letter dated August 5, 1970, and the enclosed restraining order with respect to William Zeckendorf, a/k/a William Zeckendorf Senior.

Please be advised that we will take no further action against your client until conclusion of the chapter 11 proceeding. However, we intend to proceed against all other named defendants in said action.

We would appreciate your informing us when an order is entered terminating the chapter 11 proceeding with respect to your client.

Very truly yours,

Robert B. Levin

RBL:ms
enc.

EXHIBIT "G"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 PARK AVENUE
NEW YORK, N.Y. 10022

TELEPHONE (212) 935-8000
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RANDOLPH E. PAUL 1946-1956
LOUIS S. WEISS 1927-1950

JOHN F. WHARTON
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COUNSEL

WASHINGTON OFFICE
1775 K STREET, N.W.
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SIMON H. RIFKIND
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PAUL J. NEWLON
JOSEPH S. ISEMAN
JAMES B. LEWIS
THEODORE C. SORENSEN
MARTIN KLEINBARD
RICHARD H. PAUL
NORMAN ZELENKO
JOHN E. MASSENGALE
JAY H. TOPRIS
EDWARD N. COSTIKYAN
ROBERT H. MONTGOMERY, JR.
JOHN C. TAYLOR JR
BERNARD H. GREENE
ERNEST RUBENSTEIN
ALLAN B. ECKER
STUART ROBINOWITZ
JAMES L. PURCELL
ARTHUR KALISH
DAVID T. WASHBURN
BERNARD FINKELSTEIN
ARTHUR L. LIMAN
RICHARD R. DAVIDSON
SEYMOUR HERTZ
WALTER F. LEINHARDT
GERALD D. STERN
ANTHONY B. KURLIN
MARTIN LONDON
DAVID C. BRODHEAD
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JAY GREENFIELD
KEVIN J. O'BRIEN
ALFRED D. YOUNGWOOD
DONALD F. MOORE
JOSEPH E. BROWDY
SIDNEY S. ROSDEITCHER
ROBERT L. LAUFER
ALLEN L. THOMAS

WRITER'S DIRECT DIAL NUMBER

935-8986

May 11, 1973

RE=11

Ira Jay Sands, Esq.
701 Seventh Avenue
New York, New York 10036

Friedlander v. Feinberg, et al.

Dear Ira:

As counsel for defendant William Zeckendorf, we have received copies of your deposition notices and demand for documents in the above action. To my knowledge, this is the first activity in this case since August of 1970, when I discussed the matter with Robert B. Levin, representing plaintiffs.

As I am sure your records will reflect, at that time, I informed Mr. Levin that an order restraining all actions and proceedings against Mr. Zeckendorf had been entered in connection with a Chapter XI proceeding involving Mr. Zeckendorf personally. I again enclose a copy of that order for your information. The order is still extant, there having been no final decree in the arrangement proceeding to this date.

Accordingly, it would appear to me that you are still enjoined from proceeding in any way with the above action, as Mr. Levin recognized. In light of the restraining order, no answer to the complaint has yet been interposed on behalf of Mr. Zeckendorf, and we believe all parties and counsel in the action are stayed from taking any steps in the action. This includes responding to your recent document demand or attending depositions.

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

Ira Jay Sands, Esq.
May 11, 1973

If you disagree with my position in this regard, please communicate with me immediately. Otherwise, I will assume that you, like Mr. Levin, agree that you are bound by Referee Herzog's order at this time, that no pretrial discovery steps will take place and that Mr. Zeckendorf will not interpose an answer or otherwise respond to the complaint at this time.

Sincerely,

Robert L. Laufer

RLL:sa
Enc.
cc: Pollack & Singer
Mendes & Mount
D'Amato, Costello & Shea

EXHIBIT "H"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

RE: 1
OUT
(in Sand

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

May 22, 1973

Honorable Richard J. Ward
United States District Judge
United States Courthouse
Foley Square, New York

Re: Friedlander v. Feinberg
70 Civil 2561 (RJW)

Dear Judge Ward:

With respect to the motion to dismiss because of Statute of Limitations which the defendants will finally serve upon me this Friday, I have previously noticed certain defendants for deposition which I intended to initially limit solely to the limitations question.

Your Honor may recall at the Pretrial Hearing there was a discussion of the Zeckendorf and Webb and Knapp involvement. I sent to your Honor a copy of the letter written to me by Robert Laufer, Esq. who represents the Zeckendorf interests.

Since Mr. Laufer will not permit Mr. Zeckendorf to be deposed as scheduled or produce documents, I have written to the defendants counsel to stress that after I receive the dismissal motion papers, I would like to read them and set up a short conference with your Honor to determine the timing of the limited discovery as well as the problem of Mr. Zeckendorf and Webb and Knapp which is involved in the dismissal motion.

May I respectfully request that your Honor schedule some time for this informal conference at your convenience on May 30, 31, or June 1st, or as soon thereafter as is convenient.

Respectfully yours,

IRA JAY SANDS

IJS.ej
cc: To Counsel

A-64

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
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HANDOLPH E. PAUL (1946-1956)
LOUIS S. WEISS (1927-1950)

JOHN F. WHARTON
ROBERT E. SAMUELS
COUNSEL

SIMON H. RIFKIND
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ALFRED D. YOUNGWOOD
DONALD F. MOORE
JOSEPH E. BROADUS
SIDNEY S. ROSDEITCHER
ROBERT L. LAUFER
ALLEN L. THOMAS

WRITER'S DIRECT DIAL NUMBER

935-8986

May 23, 1973

Ira Jay Sands, Esq.
701 Seventh Avenue
New York, New York 10036

Friedlander v. Feinberg, et al.

Dear Ira:

I have your letter of May 15 and wish to confirm the arrangements that you and I discussed by telephone today.

As I informed you, in light of the proceedings which have occurred to date in the above action and Judge Ward's desire that the case be litigated expeditiously, my client, William Zeckendorf, is prepared to cooperate toward that end and will not at this time interpose any objection to further discovery procedures based upon Referee Herzog's restraining order in his personal arrangement proceeding.

However, as I further informed you, I have inquired of my client as to whether he presently has within his possession, custody or control any documents relevant to this action, of the sort specified in your Demand for Documents dated May 9, 1973. I am advised that he has no such documents and, to the extent any still exist, they might be in the possession of the Trustees in Bankruptcy either of Zeckendorf Hotels Corp. or Webb & Knapp, Inc. You may treat this as Mr. Zeckendorf's response to your aforesaid Demand for Documents.

As regards your notice to take Mr. Zeckendorf's deposition, in light of the fact that we have been unaware until just recently that the above action was proceeding

EXHIBIT "J"

Ira Jay Sands, Esq.
May 23, 1973

despite the restraining order with regard to Mr. Zeckendorf, you have stated that you are agreeable to postponing any deposition of Mr. Zeckendorf to give us and him an opportunity to review the proceedings to date and attempt to reacquaint ourselves with the facts in this matter. Accordingly, you have stated that Mr. Zeckendorf's deposition will not take place on May 25 and that you will schedule his deposition after you complete whatever other depositions and discovery you require with regard to other defendants.

I understand that you intend to adjourn the other depositions which you have recently noticed at least until a conference can be held with Judge Ward to establish an overall timetable in this case. You have promised to attempt to set up such a conference as soon as possible.

I await further word from you on this matter.

Sincerely,

Robert L. Laufer

RLL:ca
cc: Hon. Robert J. Ward
Pollack & Singer
Mendes & Mount
D'Amato, Costello & Shea

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

LAW OFFICES OF
IRA JAY SANDS

701 SEVENTH AVENUE
NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

May 22, 1973

Re. 11

Paul Z. Lewis, Esq.
Messrs. Pollack & Singer
61 Broadway
New York, New York 10006

Re: Friedlander v. Feinberg

Dear Paul:

I am sure that you received a copy of the letter from Bob Laufer concerning his position with respect to the Zeckendorf and Webb and Knapp situation.

As a result, he will not permit the Zeckendorf deposition to commence on Friday, and we will have to discuss the matter with the Judge.

I think it is best for me to wait until I receive your motion papers and then attempt to arrange an appointment for all of us before the Judge the following week, to go over not only the Zeckendorf situation, but the entire limited discovery with respect to your dismissal motion.

I had hoped that you would have served me with the motion papers sometime ago, but I imagine that you needed the extra time.

I wrote to you asking for copies of certain documents so that I could fulfill my promise to one of the other defendants. I would appreciate it if you would comply as rapidly as possible.

In that respect, and because I believe that a conference with the Judge is advisable to map out the limited discovery which plaintiffs need with respect to your motion, I suggest that we will have to adjourn the deposition of Mr. Feinberg now scheduled for Tuesday May 29th and the deposition of Harris, Kerr, Forster now scheduled for Wednesday May 30th, until shortly thereafter the conference which I will attempt to set up with the Court.

Yours truly,

IRA JAY SANDS

IJS.sj
cc: Counsel

EXHIBIT "K"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE. NEW YORK. N. Y. 10036
(212) COLUMBUS 5-3500

August 17, 1972

Barry Singer, Esq.
Messrs. Singer & Pollack
61 Broadway
New York, New York

RE: COHEN vs. FEINBERG

Dear Barry:

For quite some time now, you have spoken of making a threshold motion for summary judgment with respect to the defense of Statute of Limitations.

Of course, I have no reason to doubt your intention.

Because this is such a threshold question to the entire case, as we have discussed, I wonder how soon you can make this motion, without our further delaying matters.

Cordially,

IRA JAY SANDS

IJS/vkm

EXHIBIT "L"

Law Offices
ROBERT B. LEVIN

(212) 265-3500

701 SEVENTH AVENUE
NEW YORK, N.Y. 10036

EXHIBIT ANNEXED TO AFFIDAVIT
OF IRA JAY SANDS

May 26, 1972

Pollack & Singer, Esqs.
65 Broadway
New York, New York

Re: Cohen vs. Feinberg

Attention: Barry H. Singer, Esq.

Dear Barry:

Confirming our recent conversation wherein it was agreed that the continued oral deposition of plaintiff Abraham Cohen is adjourned until June 27, 1972, at 10:30 A.M. in your office.

It is sincerely hoped that upon conclusion of this meeting, you will be able to expeditiously make your motion for summary judgment on the statute of limitations issue and resolve this singular question.

You know that we have refrained from making our application pursuant to Rule 23, et seq. F. R. Civ. P. for class determination pending decision on the foregoing Rule 56, F. R. Civ. P. motion.

Sincerely yours,

Robert B. Levin

ROBERT B. LEVIN

RBL/sj

EXHIBIT "M"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

LAW OFFICES OF
IRA JAY SANDS

701 SEVENTH AVENUE
NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

May 10, 1973

James G. Grady, Esq.
Mendes & Mount
27 William Street
New York, New York 10005

R.E 11

Re: Friedlander v. Feinberg - 70 Civ. 2561(RJW)

Dear Mr. Grady:

I have received a copy of your letter of May 7th to Judge Ward.

The adjourned date is perfectly alright with me particularly in view of the unfortunate situation which has befallen your wife.

I have just had the sad experience of finding my wife in the hospital for three months with a badly fractured ankle, and I know the grief that you are suffering. My good wishes to you and to Mrs. Grady.

I understood that the original May 18th date was not a hearing upon the motion, but a pretrial hearing upon the progress of the case. I therefore presume that the adjourned June 8th date is not a hearing on the motion either, but a regular pre-trial progress conference.

I point this out because the defendants have been undertaking to make this motion for a couple of years, and have been taking depositions over an extended period of time in order to make this motion.

I do not of course know the extent of the motion that they will make, nor the volume of papers or documents which will be involved. I therefore cannot contemplate the extent of time necessary to respond, especially in view of the fact that the plaintiffs are both presently out of town. Mrs. Friendlander lives in Baltimore as you know, and Mr. Cohen is on an extended visit to his child in Florida. It may be that since the statute of limitations motion may be based upon Mr. Cohen's knowledge or actions, that I may need direct assistance from Mr. Cohen in connection with opposition to the motion. There was no way of my telling at this stage until the papers are served upon me.

EXHIBIT "N"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

As you know, even recently, I have been asking Messrs. Pollack & Singer whether they will make the motion, and if so to please make it early so that I can have time to respond and move on with the case.

Nevertheless, it is my impression that the May 18th date was not a motion hearing date.

Cordially,

IRA JAY SANDS

IJS.sj

P.S. Amongst the reasons that I have for requesting Messrs. Pollack & Singer particularly to inform me whether they were making this motion, and if so to make the motion as rapidly as possible, were the above and further that I have prepared notices of deposition for certain witnesses particularly with respect to this intended motion. Similarly, I have prepared a request for documents, aimed particularly at ascertaining information concerning this motion, and I would like to be as informed if possible about the motion at the time that I take the depositions so that if necessary, I can adequately respond to the motion.

Because the defendants' depositions of Mr. Cohen have taken preference, I have been unable to take any discovery heretofore. I also wish to make the class action motion, particularly now that I am no longer under a disability because of the Zeckendorf bankruptcy. At the last pretrial conference, the Judge suggested that the class action motion await the determination of the statute of limitations dismissal motion. In my notice to produce documents, I have asked that the defendants try to cooperate in producing the documents at an earlier date than the formal request requires. I would appreciate it if you could assist me in complying with that earlier date.

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

May 7, 1973

Messrs. Pollack & Singer
61 Broadway
New York, New York

Re: Friedlander v. Feinberg

Att: Paul Z. Lewis, Esq.

RE11

Gentlemen:

I have been informed by Judge Ward's Chambers, that the Pretrial Hearing has been set for May 18, 1973 at 11:00 A.M., and that the time for you to file your Motion for Summary Judgment has been set for May 11th.

If you do not intend to make said motion, I would appreciate it were you to inform me promptly, since as you know, I have been a long time in waiting for the opportunity to make the necessary class action motion, and even recently, Judge Ward clearly indicated that your Motion to Dismiss should take preference in time to the class action motion.

In the meantime, and since you have had your oral depositions, and have your response to interrogatories, I am preparing and will shortly serve upon you the Decument Demand which had been mentioned.

I would appreciate hearing from you as to your intentions.

Yours truly,

IRA JAY SANDS

IJS.sj

COPY

EXHIBIT "O"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

June 4, 1973

Honorable Robert J. Ward
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Friedlander vs. Feinberg

Dear Judge Ward:

I have received a copy of the letter of May 31, 1973 to your Honor by Barry H. Singer, Esquire.

For the past many years, I have requested Mr. Singer's office, both by letter and orally, to serve the summary judgment motion papers as rapidly as possible (even earlier than the various deadline dates heretofore set), so that I could move along toward determining what discovery I may need and prepare my response to the motion.

Defendants have had a number of years for the preparation of this motion since they first mentioned their intentions. Defendants also had numerous depositions of plaintiff Cohen, while we had no discovery rights whatsoever.

A recent conversation with Mr. Singer two weeks ago indicated that the motion papers were in draft dictation and defendant Feinberg was to go over them within a day or two.

It has been quite important to me to receive the motion papers early so that I would know what preliminary discovery of documents I require from the accountants' work papers, and also from the two Zeckendorf Trustees (you recently received a copy of a letter of understanding between Robert Laufer, Esq. of Paul, Weiss, Rifkind, Wharton & Garrison and myself concerning Zeckendorf documents).

-cont-

COPY

EXHIBIT "P"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

As soon as I receive Mr. Singer's motion papers, I will be in a position to ask the two Trustees to make available their inventory lists of the documents in their warehouses. I will then have to examine certain of those documents, hopefully a very limited number, pertaining solely to the questions involved in Mr. Singer's motion papers.

I will have to sit with the attorneys for the accountants and do likewise with respect to their documents which bear upon the questions which will be raised in the summary judgment motion.

I write this letter to bring your Honor up to date and to dispute Mr. Singer's statement that the plaintiffs' responses to the interrogatories were not timely served, which they were. I also dispute that they were evasive and not responsive. They responded very clearly with all the information which we have had, despite the fact that there has been no plaintiffs' discovery permitted and further in view of the fact that the interrogatories repeated themselves paragraph after sub-paragraph after sub-paragraph. Furthermore, the interrogatories in part also repeated certain territory which had been inquired into during approximately five deposition sessions of plaintiff Cohen.

I do not intend by this letter to rebuke Mr. Singer in any manner, for I hold him in high esteem. He knows that so long as my clients' interests would not be prejudiced, I have never denied him a requested extension or courtesy over the years.

Yours truly,

IRA JAY SANDS

IJS.sj

cc: To Counsel

COPY

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By James G. Grady

United States District Court
Southern District of New York
----------*

Esther Friedlander and Abraham Cohen on behalf of themselves and all other Purchasers of Limited Partnership Interests in DRAKE ASSOCIATES, similarly situated,

Plaintiffs,

-against-

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORPORATION, PETER I. FEINBERG SECURITIES CORP., AGRIN, LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants.
----------*

70 Civ 2561
(RJW)

AFFIDAVIT
IN OPPOSITION TO
PLAINTIFFS' RULE 23
MOTION FOR CLASS
ACTION STATUS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES G. GRADY, being duly sworn, says:

1. I am a partner of Mendes & Mount, attorneys for Harris, Kerr, Forster & Company, a defendant herein ("opposing defendant"). I am familiar with the facts in the above action.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By James G. Grady

2. I make this affidavit in opposition to plaintiffs' motion for a determination that this action is to be maintained as a class action.

3. Upon information and belief, this action for damages was brought by plaintiffs Esther Friedlander and Abraham Cohen, personal representatives of Raphael Cohen, their father, purportedly on behalf of themselves and all other purchasers of limited partnership interests in Drake Associates similarly situated. As appears from the Court Docket Sheets, this action was commenced by filing of the complaint on June 17, 1970.

4. Plaintiffs purport to sue on three counts, one federal and two pendent:

First, under Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities and Exchange Act of 1934, and Rule 10 b-5;

Second, under Sections 352-c and 352-e of the New York General Business Law; and

Third, under "Common Law".

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By James G. Grady

5. In brief substance, plaintiffs allege that beginning in or about August 1959, in New York, the various above-named defendants conspired to defraud plaintiffs and the public at large by making misrepresentations in order to induce plaintiffs and the public at large to furnish equity capital to Drake Associates and in connection therewith caused and assisted in the issuance of a written selling document, the Prospectus, dated October 22, 1959. Upon information and belief, a copy of the Prospectus alleged to be here involved, obtained from the attorneys for co-defendant Peter I. Feinberg and others, was annexed as Exhibit B to the papers in support of opposing defendant's recent motion for summary judgment, on file herein.

6. As appears from the complaint, plaintiffs charge that defendants Peter I. Feinberg, Samuel Sokol, Louis Adler, Marvin Greenspan, and

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By James G. Grady

Alfred Kaplan were general partners of Drake Associates and that defendant Domax Securities Corporation and Peter I. Feinberg Securities Corp.. acted as agents of Drake Associates. Plaintiffs also included as conspirators defendants William Zeckendorf and Zeckendorf Hotels Corporation. Finally, plaintiffs also name Agrin, Lawson & Holland, appearing herein as Lawson & Holland and opposing defendant, both accounting firms, as defendants.

7. Upon information and belief, opposing defendant, a firm of certified public accountants, has no connection whatsoever with any claims alleged in the complaint and denies each and all accusatory allegations thereof. Only minimally its name appears on page 14 of the Prospectus (Exhibit B as aforesaid), where there is stated: opposing defendant's opinion on the summary of operations of the Hotel Drake for the period from August 1 to December 31, 1958, during which period the hotel was operated under a lease by Zeckendorf Hotels Corporation except for

the month of August, 1958 when the operations were conducted by the Hotel Drake Corporation under a sub-lease, and opposing defendant's opinion on the balance sheet of Drake Associates at September 30, 1959. There is nothing other than or subsequent to that insofar as opposing defendant is here concerned.

8. I am informed and believe that co-defendants Peter I. Feinberg,Drake Associates, and Peter I. Feinberg Securities Corp., by their able and here especially skilled attorneys, intend to interpose full opposition to plaintiffs' motion. I believe that these attorneys and their clients, as on prior motions by all defendants for summary judgment herein have the most knowledge of the prosecution or non-prosecution of this lawsuit by plaintiffs and matters underlying this action. Accordingly, I hereby respectfully incorporate by reference as if here set forth in full all such documentation and proper opposition which these defendants and their attorneys make to plaintiffs' instant motion.

9. Opposing defendant opposes plaintiffs'

motion on the grounds that nowhere in the moving papers or elsewhere have plaintiffs demonstrated and sustained their burden of proving that this action satisfies the statutory requirements for maintenance as a class action.

10. Among others and not by way of limitation, the principal grounds of opposition here are:

Plaintiffs' application for class action status was first made by this instant motion although, upon information and belief, this action was commenced on June 17, 1970. The recent motions for summary judgment by defendants were made in or about mid-1973. Plaintiffs certainly had from June 1970 to early or mid-1973 to make this motion if they were serious and if it was meritorious. There is no valid explanation or excuse for plaintiffs' failure to move in that period.

There is no substantial probability that plaintiffs will succeed on the merits. Plaintiffs have not sustained their burden of proof of showing the requisite probability of success on the merits.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By James G. Grady

Everything on the record to date and before this Court on the recent motions for summary judgment, including the extensive deposition of plaintiff Abraham Cohen, plaintiffs' answers to interrogatories, and affidavits and exhibits on the motions for summary judgment, shows that plaintiffs have no case on the merits and that the Court and defendants will be out to unfair and undue burden and expense if this action is determmhined to be maintained and continued as a class action.

Plaintiffs have not shown or sustained their burden of proving that questions of law and fact common to all members of the prospective class predominate over the totality of the individual issues here of, particularly including, but not limited to, Statutes of Limitations, reliance, and damages.

11. Plaintiffs failed to sustain their burden of showing and proving at and up to this point that this action should be maintained as a class action and, accordingly, their motion should be in all respects denied.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By James G. Grady

WHEREFORE, I respectfully request entry of an order herein; in all respects denying plaintiffs' motion for determination that this action should be maintained as a class action; granting such other and further relief as to the Court may be just and proper; and awarding costs and disbursements of this action to opposing defendant.

S/James G. Grady
James G. Grady

Sworn to before me
this 7th day of
March, 1974.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Barry H. Singer

United States District Court
Southern District of New York

Esther Friedlander, et ano, Plaintiffs, -against- Peter I. Feinberg, et al., Defendants.	70 Civ. 2561 (RJW) AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS ACTION STATUS

State of New York)
County of New York) ss.:

Barry H. Singer, being duly sworn, depeses and says:

Plaintiffs' claimed excuses for their three and one-half year delay in making a class action motion are both utterly without merit. There is no excuse for plaintiffs' failure to make that motion or for the dilatory manner in which plaintiffs have proceeded here. One can only conclude that plaintiffs have sought to cause the defendants as much trouble and expense as possible in order to

wrest a settlement from defendants upon what is patently a meritless and stale claim.

The Alleged Stay of this Action:

Plaintiffs' attorneys had never mentioned to my office anything about a stay arising from the Zeckendorf bankruptcy, until shortly before the time of the making of the summary judgment motion in the Spring of 1973. Nor was an adjournment of any proceeding sought because Mr. Zeckendorf's attorneys could not participate therein.

Mr. Zeckendorf and Zeckendorf Hotels Corporation are so peripheral to this litigation that it is difficult to fathom why they were named as defendants; they had no dealings with plaintiffs or any of the investors in Drake Assocaites pertaining to the offering of limited partnership interests in Drake Associates.

Certainly, plaintiffs could have and should have discontinued the action against Zeckendorf and proceeded against the other defendants. Plaintiffs would not have been prejudiced since the bankruptcy proceeding tolled the Statute of Limitations as to Zeckendorf.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Barry H. Singer

The Excuse that Plaintiffs were Waiting for Defendants to Move for Summary Judgment:

This action was commenced in June 1970. Plaintiffs did not advance the possibility of a motion for summary judgment as an excuse for not moving for class action status until nearly two years later, on May 26, 1972 (See Exhibit Q hereto). Plaintiffs' position was then and is now untenable, and I so advised plaintiffs' counsel by letter dated May 31, 1972 (Exhibit R hereto).

In any event, this excuse embodies bootstrap logic. Even if the possibility of a summary judgment motion would ordinarily excuse a brief delay in filing a class action motion -- which it would not -- at bar the excuse is without merit. Plaintiffs' counsel knew (because I so informed him) that defendants could not make a motion for summary judgment until after plaintiffs had been deposed and had produced the relevant documents. Knowing this, plaintiffs have stalled defendants' discovery since the very commencement of this action and have defaulted in their obligations (1) to appear at

depositions; (2) to produce documents; and (3) to answer interrogatories on literally dozens of occasions both prior to and subsequent to May 26, 1972.

The Dilatory Tactics of Plaintiffs:

The dilatory tactics of plaintiffs had nothing to do with the Zeckendorf bankruptcy. Our struggles to obtain discovery of the plaintiffs and plaintiffs' resistance to such discovery are clearly illustrative of this.

Shortly after the service of the summons and complaint, my office served a notice to take the deposition of the plaintiffs. A copy of the notice dated July 20, 1970, seeking depositions on July 30, 1970, is annexed hereto as Exhibit A. As appears from Exhibits B and C, plaintiffs immediately sought an adjournment of the depositions on the promise that they would fix a new date promptly. However, I was unsuccessful in obtaining from plaintiffs' attorneys an adjourned date for the deposition (See Exhibit D).

Finally, on September 4, 1970, I served a second notice to take the depositions of the plaintiffs

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Barry H. Singer

on September 21, 1970 (See Exhibit E, annexed hereto). At plaintiffs' request, the deposition of plaintiff, Abraham Cohen was adjourned to September 30, 1970. The deposition of plaintiff Esther Friedlander was adjourned without date (See Exhibit F).

On September 30, 1970, without prior notice, plaintiff Abraham Cohen and his attorney failed to appear and defaulted with respect to the taking of his deposition. After several conversations plaintiff's counsel finally agreed to reschedule the deposition for December 7, 1970. However, on December 4, 1970, plaintiff's attorney telephoned and informed us that plaintiff Abraham Cohen was on vacation in Florida and would not appear for an indefinite period of time.

Finally, on May 11, 1971, plaintiff Abraham Cohen appeared for the first session of his deposition. He arrived at 2:15 in the afternoon and would only stay until 4:00 in the afternoon. At the close of the session, plaintiff and his attorney refused to fix an adjourned date, and over our objection, the deposition was adjourned without date.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Barry H. Singer

Thereafter, until October 15, 1971, we were unable to receive from plaintiffs' attorneys a date for the continuation of the deposition of Mr. Cohen. Finally, on October 15, 1971, it was agreed that the deposition would be continued on November 5, 1971 (see Exhibit G). However, on November 4, 1971, plaintiffs' attorney called and requested an adjournment to November 24, 1971. (See Exhibit H). On November 23, 1971, plaintiff adjourned the deposition to December 2, 1971 (See Exhibit I). However, at the last minute, plaintiffs' attorney again called to adjourn the deposition to January 5, 1972 (See Exhibit J-I).

In January 1972, Martin I. Kaminsky, the attorney in my office who was handling the matter at that time, was ill and for the first time, we requested an adjournment of the deposition (Exhibit J). When Mr. Kaminsky returned to the office, he arranged for the deposition to go forward on February 15, 1972 (See Exhibit K).

However, on February 14, 1972, plaintiff's attorney again called and stated that the deposition would have to be rescheduled. The one date which he offered was unavailable to my office and the deposition was adjourned without date (See Exhibits L and M).

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Barry H. Singer

Thereafter, from February 15 to March 15, we tried in vain to reschedule the deposition. Finally, on March 15, 1972, I wrote to Mr. Levin, the attorney then handling the case for plaintiffs, requesting that he call me to arrange a date to complete the deposition (See Exhibit N). Mr. Levin neither responded to my letter nor to my follow-up telephone calls and accordingly, I wrote him again on April 10, 1972 (See Exhibit O). Still I received no response from Mr. Levin and so I served a third notice for the depositions of the plaintiffs (See Exhibit P).

Mr. Levin agreed to schedule the deposition for a day set forth in my notice (See Exhibit Q). It was on May 26, 1972, that Mr. Levin for the first time claimed that plaintiff's motion for class action status had been delayed because plaintiff was waiting for defendant to move for summary judgment on the ground of the Statute of Limitations.

Immediately upon receipt of Mr. Levin's letter, I wrote to him on May 31, 1972. I clearly and unequivocably indicated to Mr. Levin that he could not use the pending depositions or our plan to move for summary judgment as an excuse for his delay in making a class action motion (See Exhibit R).

Finally, on June 27 the deposition resumed. However, after half a day, without prior notice to us, plaintiffs' counsel insisted on adjourning the deposition because of some "personal commitment" he had made (See Exhibit S).

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
by Barry H. Singer

Thereafter we had tried in vain again to schedule the continuation of the deposition. In response to one of our many unanswered telephone calls, we received a letter dated August 17, 1972 from Mr. Sands purporting to urge us to hasten the making of a motion based on the Statute of Limitations (See Exhibit T). In reply, I outlined to Mr. Sands the frustration we had experienced in seeking to obtain discovery of the plaintiffs (See Exhibit U).

The deposition was finally resumed on August 28, 1972 -- more than two years after it had first been noticed. However, without prior notice, counsel for plaintiffs again unilaterally stated that the deposition session must be a short one allegedly because of the ill health of the plaintiff. The deposition commenced at 1:05 and was adjourned upon the demand of plaintiffs' counsel at 3:25 P.M. At the close of the session it was agreed that the deposition would resume on September 25, 1974. On September 5, 1972, Mr. Sands wrote a letter purporting to misunderstand the situation regarding discovery (See Exhibit V). On September 7, 1972, I wrote him a letter seeking to set the matter straight (See Exhibit W). In my letter of September 7th, I pointed out the many refusals of Mr. Levin to produce and mark the decedent's papers as well as the refusal of Mr. Levin and Mr. Cohen to attend a deposition for any reasonable period of time. On September 14, 1972 my associate Mr. Lewis wrote to plaintiffs' counsel reminding him that the deposition was to resume on September 25, 1972 and reminding him of his obligation to produce the decedent's file on the Drake Associates

syndication (See Exhibit X).

True to form, on the eve of the adjourned date, plaintiffs' attorneys requested an adjournment to October 5, and then a further adjournment to October 10, we reminded plaintiffs' attorney of his obligation to deliver to us a number of documents which had been requested and promised during the earlier sessions of the deposition.

On the eve of October 10, 1972 plaintiffs' attorneys again demanded an adjournment of the deposition on the ground that their client was out of town. It was claimed that no adjourned date could be fixed until plaintiff Abraham Cohen returned. Thereafter, on seven separate occasions my associate Mr. Lewis sought to call plaintiffs to schedule the adjourned date but received no response (See Exhibit Z).

In response to our letter of November 3, 1972 plaintiffs' attorneys wrote a letter claiming falsely that defendants had been equally responsible for the many adjournments in the case. More important, defendants' attorneys for the first time refused to produce the many documents they had previously agreed to produce. Plaintiffs' attorneys suggested that defendants should resort to a motion for discovery and inspection under Rule 34 (See Exhibit AA).

In our reply dated November 9, 1972, we suggested that plaintiff's deposition resume on November 20 or November 22 (See Exhibit BB). However, despite the fact that these dates

had been previously agreed to by plaintiffs' attorney, he called on receipt of our letter of November 9 and refused to proceed on either date.

After several telephone calls, the date for the resumption of plaintiffs' deposition was fixed for November 8, 1972 (See Exhibit CC).

However, on the day before the scheduled date, plaintiffs' attorneys called and cancelled the session on the ground that plaintiff Cohen was again on vacation (See Exhibit DD).

Thereafter, the deposition was finally resumed on December 6, 1973. At the conclusion of the session, we directed the attention of the attorneys for plaintiffs to the fact that there were still a number of documents which plaintiffs had failed to produce. Plaintiffs' attorneys refused to produce the documents, took the position that the deposition had been completed, and relegated us to further remedies in court.

Thereafter, the case was assigned to Hon. Robert J. Ward, and on or about December 6, 1972 all parties received notice from Judge Ward that a pre-trial conference in the case would be held on January 26, 1973 at 11:00 A.M.

On or about January 24, 1973 in order to try to expedite the conclusion of discovery on the part of defendants and to avoid litigation over the documents which were owed to us, we served interrogatories upon the attorneys for plaintiffs.

The answers to these interrogatories were due on February 23, 1973.

Without notice to anyone, plaintiffs and their attorneys defaulted in appearing as directed before District Judge Ward. On January 26, 1973 Judge Ward instructed us to notify the attorneys for plaintiffs that the conference was adjourned until February 16, 1973, and that the attorneys for plaintiffs would be required to be present at that time. We so notified the attorneys for plaintiffs (See Exhibit EE).

One week before the scheduled pre-trial conference the attorneys for plaintiffs requested a second adjournment of the pre-trial conference for a month until March 23, 1973. We consented reluctantly to this adjourned date and in a letter confirming the adjournment we reminded plaintiffs that we expected that they would serve timely answers to our interrogatories (See Exhibit FF).

In response, plaintiffs' attorneys protested our request that they comply with the Federal Rules as to the time for responding to interrogatories, claiming erroneously that we were seeking to impose a unilateral condition to the adjournments (See Exhibits GG and HH).

The answers to the interrogatories were not served when due. No extension of time to serve the answers was agreed to by us.

AFFIDAVIT OPPOSING MOTION PURSUANT TO RULE 23

By Barry H. Singer

At the pre-trial conference on March 23, 1973, the Court directed that the answers be served on April 20, 1972, and the attorneys for plaintiffs promised to meet this deadline. Plaintiffs, however, did not comply with that direction of the court. Accordingly, on April 23, 1973, we notified plaintiffs' attorneys of their default and demanded that they promptly serve the answers to the interrogatories (See Exhibit II).

The answers to the interrogatories were finally served in incomplete condition on April 26, 1973. The answers to the interrogatories were not responsive and were grossly improper; see for example answer 2(f), which merely makes reference to the vague allegations of the complaint.* (Indeed in its opinion denying summary judgment, this court characterized the plaintiffs' answers to interrogatories as unresponsive).

After receipt of the unresponsive answers to interrogatories, defendants were faced with a Hobson's choice as to whether to press for responsive answers, a task which on the basis of prior experience might consume another year and inordinate expense to defendants, or whether to proceed with the motion for summary judgment on the basis of what we deemed to be conclusive admissions made in the answers to the interrogatories. Our decision to pursue the summary judgment

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* See also responses 3(a) - (f), 4(a) - (h), 5(c), 5(d), 5(f) - (h), 5(i), 6(b), 7(a) and (b), 9(a) - (c), 10(b), 11(a) - (d), 12(i) - (xxx), 15, 16 and 17.

was an attempt to save time and expense and should not be deemed by this Court as an indication of satisfaction with the grossly improper answers which were served in response to our interrogatories.

On the basis of the foregoing, it should be clear to the court that plaintiffs have not pursued this action vigorously. Indeed, their dilitory tactics appear to have been designed to delay the progress of the action in the hopes that at some point (with the mortgage payment and liquidation scheduled for June, 1974) they can exact a settlement from defendants for plaintiffs' worthless claims.

Plaintiffs have failed promptly to move for a class action determination. For more than three years they failed to seek any discovery whatsoever and they have taken no affirmative steps in this action and done nothing except engage in dilatory tactics. This dilatory conduct and plaintiffs' complete unfamiliarity with the facts underlying the transactions which are the subject of this lawsuit demonstrate beyond doubt that plaintiffs are not fit representatives of any class herein.

The class action motion should be denied.

(Sgd) Barry H. Singer
Barry H. Singer

Sworn to before me this
7th day of March, 1974.

By Richard M. Asche

EXHIBIT ANNEXED TO AFFIDAVIT

United States District Court
Southern District of New York

Esther Friedlander and Abraham Cohen, on behalf of themselves and all other Purchasers of Limited Partnership Interests in Drake Associates, similarly situated,	70 Civ. 2561
Plaintiffs,	
-against-	NOTICE TO TAKE DEPOSITIONS UPON ORAL EXAMINATION
Peter I. Feinberg, Samuel Sokol, Webb & Knapp, Inc., Louis Adler, Marvin Greenspan, William Zeckendorf, Zeckendorf Hotels Corporation, Drake Associates, Alfred Kaplan, Domax Securities Corp., Agrin, Lawson & Holland and Harris, Kerr, Forster & Company,	
Defendants.	

S I R S :

Please take notice that pursuant to Rule 26 et seq. of the Federal Rules of Civil Procedure, the defendant Peter I. Feinberg will take the depositions on oral questions and answers of the plaintiffs as follows:

Abraham Cohen, July 30, 1970 at 10:00 a.m.

Esther Friedlander, July 30, 1970 at 2:00 p.m.

EXHIBIT "A"

EXHIBIT ANNEXED TO AFFIDAVIT

The depositions will be taken before a notary public of the State of New York at the offices of Pollack & Singer, 111 Broadway, New York, New York 10006. You are invited to attend and cross-examine.

Dated: New York, New York
July 20, 1970.

Yours, etc.,
Pollack & Singer

By_____
Barry H. Singer
A Member of the Firm
111 Broadway
New York, New York 10006
WO 4-5770

To: Messrs. Sands, Geller & Webb
701 Seventh Avenue
New York, New York 10031

EXHIBIT "A"

LAW OFFICES OF
SANDS, GELLER AND WEBB

EXHIBIT ANNEXED TO
AFFIDAVIT

701 SEVENTH AVENUE
NEW YORK, N. Y. 10036
(212) COLUMBUS 5-3500

IRA JAY SANDS
JAMES A. GELLER
HAROLD WEBB
ROBERT B. LEVIN
MICHAEL MANTELL

July 31, 1970

Barry Singer, Esq.
Pollack & Singer, Esqs.
111 Broadway
New York, N.Y.

Re: Cohen v. Feinberg

Dear Barry:

This will confirm our telephone agreement that the depositions of the plaintiffs which you have previously noticed will be adjouned to a date which will be mutually set by us in the very near future.

Cordially,

Ira Jay Sands

IJS:ejm
SGW

EXHIBIT "B"

EXHIBIT ANNEXED TO AFFIDAVIT

August 5, 1970

Ira J. Sands, Esq.
Sands, Geller & Webb
701 Seventh Avenue
New York, New York 10036

Re: Friedlander v. Feinberg

Dear Ira:

I acknowledge your letter of July 31, 1970 and confirm that the depositions were adjourned. I would very much appreciate your letting me know as soon as possible what date will be convenient for the plaintiffs and the member of your firm who will handle the matter.

Sincerely yours,

EXHIBIT "C"

EXHIBIT ANNEXED TO AFFIDAVIT

August 18, 1970

Ira J. Sands, Esq.
701 Seventh Avenue
New York, New York 10036

Re: Friedlander v. Feinberg

Dear Ira:

Thank you for returning to me the stipulation in the above matter extending the time of defendants to move or answer until 30 days after completion of the depositions of the plaintiffs. I would very much appreciate your letting me know as soon as possible when we may schedule those depositions. Also, please don't forget to let me know what reports you have from the marshal concerning service of process.

Sincerely yours,

EXHIBIT "D"

EXHIBIT ANNEXED TO AFFIDAVIT

United States District Court
Southern District of New York

Esther Friedlander and Abraham Cohen on behalf of themselves and all other Purchasers of Limited Partnership Interests in Drake Associates, similarly situated,	70 Civ. 2561
Plaintiffs,	Notice To Take Deposition
-against-	
Peter I. Feinberg, Samuel Sokol, Webb & Knapp, Inc., Louis Adler, Marvin Greenspan, William Zeckendorf, Zeckendorf Hotels Corporation, Drake Associates, Alfred Kaplan, Domax Securities Corp., Agrin, Lawson & Holland and Harris, Kerr, Forster & Company,	
Defendants.	

S i r s :

Please take notice that pursuant to Rules 26 et seq. of the Federal Rules of Civil Procedure, the defendant Peter I. Feinberg will take the depositions on oral questions and answers of the plaintiffs as follows:

Abraham Cohen, September 21, 1970 at 10:00 a.m.

Esther Friedlander, September 21, 1970 at 2:00 p.m.

The depositions will be taken before a notary public of the State of New York at the offices of

EXHIBIT "E"

EXHIBIT ANNEXED TO AFFIDAVIT

Pollack & Singer, 111 Broadway, New York, New York 10006.

You are invited to attend and cross-examine.

Dated: New York, New York
September 4, 1970

Yours, etc.,

Pollack & Singer

By /s/ BARRY H. SINGER
Barry H. Singer
A Member of the Firm
111 Broadway
New York, New York 10006
WO 4-5770

To: Messrs. Sands, Geller & Webb
701 Seventh Avenue
New York, New York 10031

Messrs. Mendes & Mount
27 William Street
New York, New York 10005

EXHIBIT "E"

LAW OFFICES OF
SANDS, GELLER AND WEBB

701 SEVENTH AVENUE
NEW YORK, N. Y. 10036
(212) COLUMBUS 5-3500

IRA JAY SANDS
JAMES A. GELLER
HAROLD WEBB
ROBERT B. LEVIN
MICHAEL MANTELL
SAMUEL H. GOLDEN

EXHIBIT ANNEXED TO AFFIDAVIT

September 16, 1970

Barry H. Singer, Esq.
Pollack & Singer
111 Broadway
New York, N.Y. 10006

Re: Friedlander v. Feinberg

Dear Mr. Singer:

After talking with Mr. Grady of Mendes & Mount, Esqs., the date of September 30, 1970 at 11 A.M. at your office was set for the oral deposition of Abe Cohen.

I believe that you had previously discussed your availability on said date with Mr. Grady, and it appeared convenient for his office and mine.

Very truly yours,

Robert B. Levin

RBL:ms

P.S. Esther Friedlander is in Virginia and not available at this time.

EXHIBIT "F"

EXHIBIT ANNEXED TO AFFIDAVIT

October 15, 1971

Robert Levin, Esq.
c/o Office of Ira Sands
701 Seventh Avenue
New York, New York 10036

re: Cohen v. Feinberg (Drake Associates)

Dear Bob:

This letter will confirm our telephone conversation today in which we agreed that the deposition of Mr. Cohen would continue on Friday, November 5, 1971 at 10:15 A.M. at our office.

Sincerely yours,

Martin I. Kaminsky

bcc: Charles Rubman, Esq.

EXHIBIT "G"

EXHIBIT ANNEXED TO AFFIDAVIT

November 4, 1971

Robert Levin, Esq.
Office of Ira J. Sands
Sands, Geller and Webb
701 Seventh Avenue
New York, New York 10036

re: Cohen v. Feinberg (Drake Associates)

Dear Bob:

Confirming our telephone conversation of today, the deposition of Mr. Cohen will resume on November 24 at our office at 10:15 A.M. rather than tomorrow at 10:15 A.M.

Sincerely yours,

Martin I. Kaminsky

EXHIBIT "H"

EXHIBIT ANNEXED TO AFFIDAVIT

November 23, 1971

Robert Levin, Esq.
Office of Ira J. Sands
Sands, Geller and Webb
,01 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg (Drake Associates)

Dear Bob:

Confirming our telephone conversation of yesterday, the deposition of Mr. Cohen will resume on December 2, 1971 at our office at 10:15 A.M. rather than tomorrow at 10:15 A.M.

Sincerely yours,

Martin I. Kaminsky

EXHIBIT "I"

EXHIBIT ANNEXED TO AFFIDAVIT

MAILED 12/30/71
RE
RE
DIARY
APPROVED

December 30, 1971

Robert Levin, Esq.
c/o Office of Ira Sands
Sands, Geller & Webb, Esqs.
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg
(Drake Associates)

Dear Bob:

Confirming our telephone conversation of yesterday, the resumption of the deposition of Mr. Cohen is adjourned until January 5, 1972 at 10:15 A.M. at our office.

Sincerely,

Martin I. Kaminsky

EXHIBIT "J"

EXHIBIT ANNEXED TO AFFIDAVIT

January 4, 1972

Robert B. Levin, Esq.
Office of Ira J. Sands
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg (Drake Associates)

Dear Mr. Levin:

This letter will confirm our telephone conversation of today's date in which it was agreed to adjourn the oral examination of Mr. Cohen to a date to be agree upon between you and Mr. Kaminsky when the latter is recovered from his illness.

Your consideration is appreciated.

Sincerely yours,

Neil D. Thompson

EXHIBIT"J-1"

EXHIBIT ANNEXED TO AFFIDAVIT

January 21, 1972

Robert Levin, Esq.
Office of Ira J. Sands
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg (Drake Associates)

Dear Bob:

Confirming our telephone conversation of today, the deposition of Mr. Cohen will continue on February 15, 1972, at 10:15 A.M., at our office.

Sincerely yours,

Martin I. Kaminsky

EXHIBIT "K"

EXHIBIT ANNEXED TO AFFIDAVIT

Cohen v Feinberg (Drake Ass)
Answ

To M. D. K.

Date 2/14/72 Time 12:10 A.M. P.M.

WHILE YOU WERE OUT

M Robert
~~Mr. Lang~~

of Sen Santa Office

Phone
Area Code Number Extension

TELEPHONED	✓	PLEASE CALL HIM	✓
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		RUSH	
	RETURNED YOUR CALL		

Message: Would like to cancel C.B.I. Schedule for tomorrow. He would like to reschedule it for next Tues. Please call him to confirm same.

AD 8 Operator

12:50 called and told him

EXHIBIT "L"

EXHIBIT ANNEXED TO AFFIDAVIT

February 14, 1972

Robert Levin, Esq.
Law Offices of Ira J. Sands
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg (Drake Associates)

Dear Bob:

Pursuant to your telephone request to my office, continuation of the deposition of Mr. Cohen is adjourned from tomorrow to a mutually convenient date to be agreed upon by us.

Sincerely yours,

Martin I. Kaminsky

EXHIBIT "M"

EXHIBIT ANNEXED TO AFFIDAVIT

March 15, 1972

Robert Levin, Esq.
701 7th Avenue
New York, New York

Re: Cohen vs. Feinberg

Dear Mr. Levin:

I would appreciate your calling me to arrange a date to complete the deposition of the plaintiff in the above case. I think it is time that we dispose of it. I would request that at deposition, you be prepared to produce the file of Raphael Cohen pertaining to Drake Associates and any other material that Mr. Cohen had with relation to the partnership, the Drake Hotel, Mr. Zeckendorf or any of his companies.

Very truly yours,

POLLACK & SINGER

By BHS
Barry H. Singer

BHS:hp

EXHIBIT "N"

EXHIBIT ANNEXED TO AFFIDAVIT

April 10, 1972

Robert Levin, Esq.
701 Seventh Avenue
New York, New York

Re: Cohen v. Feinberg

Dear Mr. Levin:

I would very much appreciate your prompt response to my letter of March 15, 1972. Unless I hear from you, I will have no other course than to unilaterally select a date.

Very truly yours,

Barry H. Singer

BHS:EMS

EXHIBIT "O"

EXHIBIT ANNEXED TO AFFIDAVIT

United States District Court
Southern District of New York

Esther Friedlander and Abraham Cohen on behalf of themselves and all other Purchasers of Limited Partnership Interests in Drake Associates, similarly situated,	70 Civ. 2561
Plaintiffs,	Notice to Take Deposition
-against-	
Peter I. Feinberg, Samuel Sokol, Webb & Knapp, Inc., Louis Adler, Marvin Greenspan, William Zeckendorf, Zeckendorf Hotels Corporation, Drake Associates, Alfred Kaplan, Domax Securities Corp., Agrin, Lawson & Holland and Harris, Kerr, Forster & Company,	
Defendants.	

S i r s :

Please take notice that pursuant to Rules 26 et seq. of the Federal Rules of Civil Procedure, the defendant Peter I. Feinberg will take the depositions on oral questions and answers of the plaintiffs as follows:

Abraham Cohen (Continuation), May 10, 1972, at 10:00 a.m.

Esther Friedlander, May 10, 1972, at 2:00 p.m.

EXHIBIT "P"

EXHIBIT ANNEXED TO AFFIDAVIT

The depositions will be taken before a notary public of the State of New York at the offices of Pollack & Singer, 61 Broadway, New York, New York 10006. You are invited to attend and cross-examine.

Dated: New York, New York
May 1, 1972

Yours, etc.,

Pollack & Singer

By (Sgd.) Barry H. Singer
Barry H. Singer,
A Member of the Firm,
61 Broadway,
New York, New York 10006
212-952-0330

To: Ira Jay Sands, Esq.
701 Seventh Avenue
New York, New York 10031

Messrs. Mendes & Mount
27 William Street
New York, New York 10005

EXHIBIT "P"

Law Offices
ROBERT B. LEVIN

(212) 265-3500

701 SEVENTH AVENUE
NEW YORK, N.Y. 10036

EXHIBIT ANNEXED TO AFFIDAVIT

May 26, 1972

Pollack & Singer, Esqs.
65 Broadway
New York, New York

Re: Cohen vs. Feinberg

Attention: Barry H. Singer, Esq.

Dear Barry:

Confirming our recent conversation wherein it was agreed that the continued oral deposition of plaintiff Abraham Cohen is adjourned until June 27, 1972, at 10:30 A.M. in your office.

It is sincerely hoped that upon conclusion of this meeting, you will be able to expeditiously make your motion for summary judgment on the statute of limitations issue and resolve this singular question.

You know that we have refrained from making our application pursuant to Rule 23, et seq. F. R. Civ. P. for class determination pending decision on the foregoing Rule 56, F. R. Civ. P. motion.

Sincerely yours,

Robert B. Levin

ROBERT B. LEVIN

RBL/sj

Exhibit "Q"

EXHIBIT ANNEXED TO AFFIDAVIT May 31, 1972

Robert B. Levin, Esq.
701 Seventh Avenue
New York, New York 10036

Dear Bob:

Your letter of May 26 reflects part of our recent conversation. Prior to receiving your letter, I had served upon you by mail notices to complete the deposition of Abraham Cohen and to take the deposition of his co-plaintiff and also a notice to take the deposition of the plaintiff Cote on the dates which we discussed.

We have never heretofore discussed when or whether you would make a motion pursuant to Rule 23 for class determination. I have no knowledge of why you have refrained from making such an application heretofore.

Sincerely yours,

Barry H. Singer

BHS:EMS

EXHIBIT "R"

MR. LEVIN: This deposition is adjourned until approximately the second week in August, and counsel for all parties represented here this afternoon will communicate with each other in the latter part of this afternoon to fix a date for sometime in August of this year that is convenient to all concerned.

MR. LEWIS: We are willing to continue today and Mr. Cohen cannot continue.

MR. LEVIN: This adjournment is requested by plaintiffs' counsel because of personal commitments this afternoon.

May the record indicate that we have been here for three hours now on a continued examination of Mr. Cohen, and we submit to all concerned that we will readily show up next time around to continue this examination once again.

(Time noted: 1:23 p.m.)

_____

Abraham Cohen

Subscribed and sworn to before me
this ____ day of _____ 1972.

_____

LAW OFFICES OF
IRA JAY SANDS

701 SEVENTH AVENUE
NEW YORK, N. Y. 10036
(212) COLUMBUS 5-3500

EXHIBIT ANNEXED TO AFFIDAVIT

August 17, 1972

Barry Singer, Esq.
Messrs. Singer & Pollack
61 Broadway
New York, New York

RE: COHEN vs. FEINBERG

Dear Barry:

For quite some time now, you have spoken of making a threshold motion for summary judgment with respect to the defense of Statute of Limitations.

Of course, I have no reason to doubt your intention.

Because this is such a threshold question to the entire case, as we have discussed, I wonder how soon you can make this motion, without our further delaying matters.

Cordially,

IRA JAY SANDS

IJS/vkm

EXHIBIT "T"

EXHIBIT ANNEXED TO AFFIDAVIT

August 23, 1972

Ira Jay Sands, Esq.
701 Seventh Avenue
New York, New York

Re: Friedlander and Cohen
v. Feinberg

Dear Ira:

Your letter of August 17, 1972 astounds me.

For over a year, we have been attempting to complete the deposition of the plaintiffs, which is a requisite to the motion for summary judgment with respect to the defense of statute of limitations. We have been completely unsuccessful in obtaining a deposition of Mrs. Friedlander. Mr. Cohen has been made available to us for only short periods of time. Unwarranted objections have been made with respect to questions asked of him and our repeated requests for the decedent's file regarding this real estate investment have met with one excuse after another byt no compliance. Most recently, we have had to again adjourn Mr. Cohen's deposition. The situation is one which is causing me great embarrassment with the client and I have written numerous letters of protest about to your office.

As soon as you cooperate in producing the plaintiff for the completion of deposition, we will move immediately for summary judgment.

Sincerely,

Barry H. Singer

BHS:EMS

EXHIBIT "U"

LAW OFFICES OF
IRA JAY SANDS

701 SEVENTH AVENUE
NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

EXHIBIT ANNEXED TO AFFIDAVIT

September 5, 1972

Barry H. Singer, Esq.
Pollack & Singer, Esqs.
61 Boradway
New York, N.Y. 10006

Re: Freidlander and Cohen
v. Feinberg

Dear Barry:

In response to your letter of August 23rd, Bob Levin tells me that Cohen has appeared for his third deposition session and that another session is still planned. Have pity on the poor plaintiff.

Bob also tells me that he has given to your associate Mr. Lewis, the ledger maintained by Raphael Cohen.

As to Bob's objections, I cannot comment from other than what Bob tells me about the question put to Mr. Cohen which prompted his objections.

As to Mrs. Freidlander, we have long maintained and clearly stated that she has now and previously had no information whatsoever concerning this syndicate or the other real estate investment of its type by her late father. We have received this information and have passed it on to you and would of course renew our offer to stipulate to that effect. Thus Mrs. Friedlander is nothing more than a name, rank and serial number witness; it would certainly not be fair to bring her in from out of town for that.

Based upon all of the circumstances, we would like to move rapidly ahead not only on the necessary motions by both sides, but onto actual real live discovery by the plaintiffs, as soon as the various motions we discussed have been made.

May I request that you get started on your summary judgment motion as soon as possibly convenient and we will do likewise on our end.

EXHIBIT "V"

EXHIBIT ANNEXED TO AFFIDAVIT

Bob Levin in his appearances at your office and I in my many telephone discussions with you have never raised any question but that you had the absolute right to make your summary judgment motion and that it was a threashold serious question of importance to both sides. The ledger which Bob gave to Mr. Lewis is more than you even requested in the way of documents, but we did not want to hamper you in any way with respect to your summary judgment question but agreed that we should get this over with right away, if possible.

I hope that you have had a healthy and good summer. Unfortunately, since my daughter was married on July 2nd, I have had a dreadfully unhealthy summer family-wise but hope for a healthier fall.

With all good wishes.

Cordially,

Ira Sands

IRA JAY SANDS

IJS.sj

EXHIBIT ANNEXED TO AFFIDAVIT

September 7, 1972

Ira J. Sands, Esq.
701 Seventh Avenue
New York, New York 10036

Dear Ira:

Thank you for your letter of September 5, 1972. You are misinformed by Mr. Levin. As late as the third session of the deposition, Mr. Levin again refused to produce for inspection and marking the file of the decedent relating to his investment in Drake Associates. The fact that a number of sessions have been required is due to the fact that Mr. Cohen or Mr. Levin has consistently refused to continue with his testimony and we have had sessions of limited time only.

With respect to Mrs. Friedlander, we will accept your offer to stipulate that she has no knowledge concerning any issue relevant to the case.

Please see that the decedent's file relating to the Drake Associates investment is made available to us immediately.

Sincerely yours,

Barry H. Singer

BHS:lt

EXHIBIT "W"

EXHIBIT ANNEXED TO AFFIDAVIT

September 14, 1972

Robert Levin, Esquire
Office of Ira Jay Sands, Esquire
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg:

Dear Bob:

This is to confirm that your examination of Abraham Cohen will resume at 10:00 A. M. at this office on September 25, 1972.

I expect to receive tomorrow the so-called "Drake Syndication file" that you have promised to deliver in our conversation today.

I am enclosing a copy of a transcript of the last session of Mr. Cohen's deposition.

Sincerely,

Paul Z. Lewis

PZL:met
Enclosure

cc: James Grady, Esq.

EXHIBIT "X"

EXHIBIT ANNEXED TO AFFIDAVIT

October 5, 1972

Robert B. Levin, Esquire
Office of Ira Jay Sands
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg

Dear Bob:

This is to confirm that the deposition of Abraham Cohen, which was adjourned on October 3 at your request will be resumed on October 10, 1972 at 10:00 A. M.

I would appreciate it if you would arrange to have with you at the deposition the following items which have been previously requested by me or by Mr. Kaminsky:

- Tax returns of Raphael Cohen reflecting real estate investments made by him.

- Raphael Cohen's will.

- Accounting documents filed in connection with Raphael Cohen's estate.

EXHIBIT "Y"

EXHIBIT ANNEXED TO AFFIDAVIT

- Form 706 of Raphael Cohen's Federal Estate Tax Return.

- List of actions commenced by Raphael Cohen in connection with his real estate investments.

- Cutler building prospectus.

I certainly concur with your remarks today about expediting Mr. Cohen's deposition. So that we don't run into delays, I would greatly appreciate it if you would arrange to have at the deposition all correspondence, memoranda or any other records or communications relating to the Drake Associates syndication in plaintiffs' control or custody, other than those papers from the so-called "Drake Syndication" file which you sent to me on September 21.

Sincerely,

Paul 2. Lewis

PZL:met

cc: J. Grady, Esq.

AFFIDAVIT ANNEXED TO EXHIBIT

November 3, 1972

Robert B. Levin, Esquire
Office of Ira Jay Sands
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg

Dear Bob:

I have called you on seven occasions within the last three weeks in an attempt to schedule a date for resuming the deposition of Abraham Cohen.

I am appalled that you have refused to answer any one of those calls, or return those calls.

It is obvious that your client has no interest in prosecuting this matter and that you are attempting to impede our motion for summary judgment.

Please call me immediately so that we can schedule a date for the next session.

Sincerely,

Paul Z. Lewis

bcc: James Grady, Esq.

EXHIBIT "Z"

IRA JAY SANDS

EXHIBIT ANNEXED TO AFFIDAVIT

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

November 7, 1972

Paul Z. Lewis, Esq.
Messrs. Pollack and Singer
61 Broadway
New York, New York 10006

Re: Cohen v. Feinberg

Dear Paul:

I am in receipt of your letter dated November 3, 1972, and I am quite appalled at its contents. While I have not chosen, up to this moment, to engage with you in what might be facetiously termed "a self-serving paper trail," I believe that your records should reflect the following.

For every adjournment that ever occurred with regard to the above matter, your office through Mr. Singer, Mr. Kaminsky or yourself, has requested at least, if not more than fifty percent of the adjournments. In fact, the last adjournment was had at your specific and personal request.

I have produced Mr. Cohen at your office on three separate occasions. It is not the plaintiff's fault that he is of retirement age and personally not in the best of health. He has done his best to comply with the requirements of the applicable federal rules of civil procedure and he shall continue to do so.

In reviewing your letter dated October 5, 1972, I have concluded that the documents required in the second paragraph would be more appropriately obtained under a Rule 34 demand, and accordingly the plaintiff will not produce them at what I hope will be the final session of his deposition.

Very truly yours,

Robert B. Levin

ROBERT B. LEVIN

RBL/jmc

EXHIBIT AA

EXHIBIT ANNEXED TO AFFIDAVIT

November 9, 1972

HAND DELIVER

Robert B. Levin, Esquire
Office of Ira Jay Sands
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg

Dear Bob:

I have no intention of wasting valuable time in creating any kind of so-called "paper trail". My sole purpose is to expeditiously conduct discovery in this matter.

Only two adjournments have been requested by the office - both due to the fact that Marty Kaminsky was out due to illness. Your statement is erroneous: I have never requested an adjournment in this matter and have been willing to accept almost any date you have suggested so long as it would also accommodate Mr. Grady. On one occasion, we even proceeded in Mr. Grady's absence, with his reluctant consent. We did so in order to make every effort to complete the deposition as quickly as possible.

EXHIBIT "BB"

EXHIBIT ANNEXED TO AFFIDAVIT

I do believe that my remarks about the progress of this deposition are fully justified and borne out by the fact that it has taken you over a month to review my letter of October 5 and to conclude that documents which I requested will not be produced except under a Rule 34 demand. I would have thought that between us we could have worked out a simpler method of discovery for the convenience of parties and attorneys alike.

But I concur with you that these kind of exchanges between us serve no useful purpose and, in truth, are counter productive to both our objectives: the expeditious completion of the deposition in a manner as physically comfortable as possible for Mr. Cohen.

In that spirit, and in view of the fact that you will be traveling next week, I suggest we resume Mr. Cohen's deposition at 10:00 A. M. either on November 20 or November 22, 1972. Mr. Grady will be unable to attend on November 21.

I would appreciate your calling me to confirm a date.

Sincerely,

Paul Z. Lewis

PZL:met

EXHIBIT "BB"

EXHIBIT ANNEXED TO AFFIDAVIT

November 22, 1972

Robert B. Levin, Esquire
Office of Ira Jay Sands
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg

Dear Bob:

This is to confirm that the deposition of Abraham Cohen will resume at this office on November 28, 1972 at 10:00 A. M.

Sincerely,

Paul Z. Lewis

PZL:met

EXHIBIT "CC"

EXHIBIT ANNEXED TO AFFIDAVIT

Cohen v. Fensterheim

To P2L Corresp.

Date 11/27/72 Time 10:25 A.M. P.M.

WHILE YOU WERE OUT

M Rob Lenn

of

Phone 265 3500
Area Code Number Extension

TELEPHONED	✓	PLEASE CALL	✓
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		RUSH	
	RETURNED YOUR CALL		

Message Cohen is on vac. will be back on Monday

AD 8

Operator

Sovereign C & R Company where Quality is King.
321 Broadway - New York, N. Y. 10007 - BEekman 3-3850

EXHIBIT "DD"

EXHIBIT ANNEXED TO AFFIDAVIT

January 26, 1973

Robert Levin, Esq.
c/o Ira Jay Sands, Esq.
701 Seventh Avenue
New York, New York 10036

Re: Friedlander v. Feinberg

Dear Sir:

Upon your failure to appear this morning at the pre-trial conference scheduled before Judge Ward, the Court instructed counsel for defendants (all of whom were present) to inform you that the conference is adjourned until February 16, 1973 at 9:45 A.M. (Room 905) and that you are required to be present.

Very truly yours,

Pollack & Singer

By RMA
Richard M. Asche

RMA:lt

EXHIBIT "EE"

EXHIBIT ANNEXED TO AFFIDAVIT

February 9, 1973

Robert Levin, Esq.
Office of Ira Jay Sands, Esq.
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg

Dear Mr. Levin:

We consent to your request for a second adjournment of the pre-trial conference in the above matter to March 23, 1973.

It should be emphasized that we are extending this courtesy with full expectations that plaintiffs are to serve timely answers to defendant's interrogatories served on January 24, 1973.

Sincerely,

Paul Z. Lewis

PZL:rd

cc: Hon. Robert J. Ward

EXHIBIT "FF"

A-134

IRA JAY SAND — EXHIBIT ANNEXED TO AFFIDAVIT

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

February 15, 1973

Honorable Robert J. Ward
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Cohen v. Feinberg - 70 Civ. 2561

My Dear Judge Ward:

I am in receipt of a letter dated February 9, 1973, signed by Paul Z. Lewis, Esq., of counsel to defendant Feinberg in the above matter.

Prior thereto I had informed his office of the adjournment of the pretrial hearing from February 16th to March 23rd upon my request subject to other counsels' ability to be present on such date.

Except for the office of Pollack & Singer, Esqs., all other counsel have indicated their consent and acceptance of the adjourned date. Messrs. Pollack & Singer have not indicated their physical inability to be present, but have unilaterally and without prior discussion, attempted to tack on a condition to their consent to the adjournment.

We believe the conduct of counsel for defendant Feinberg to be not in keeping with your Honor's ruling upon my request in that Messrs. Pollack & Singer have shown no inability to attend the pretrial conference on the adjourned date.

We do not consent to any unilateral condition attached by Messrs. Pollack & Singer to the adjournment herein.

Respectfully yours,

ROBERT B. LEVIN

RBL-IJS/sj

cc: To all Counsel

EXHIBIT "GG"

EXHIBIT ANNEXED TO AFFIDAVIT

February 16, 1973

Hon. Robert J. Ward
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Re: Cohen v. Feinberg
(70 Civ. 2561)

Dear Judge Ward:

We are in receipt of Mr. Levin's letter to your Honor dated February 15, 1973.

We never imposed any conditions on our consent to Mr. Levin's request for an adjournment. Our letter of February 9, 1973 merely stated our own request to Mr. Levin to ensure service of plaintiff's answers to defendants' interrogatories when they are due. The deadline for plaintiff's answers is February 24, 1973, prior to the new date for the pre-trial conference.

Respectfully yours,

Paul Z. Lewis

PZL:rd

cc: Robert B. Levin, Esq.

EXHIBIT "HH"

EXHIBIT ANNEXED TO AFFIDAVIT

April 23, 1973

BY HAND

Ira Jay Sands, Esq.
701 Seventh Avenue
New York, New York 10036

Re: Cohen v. Feinberg

Dear Mr. Sands:

I received in this morning's mail your two letters of April 19, 1973. I also note that I did not receive in the mail this morning answers to the interrogatories which you were required by Judge Ward to serve us on April 20, 1973. Consequently, you are in default in serving these answers.

I am delivering to you today Abraham Cohen's account book which was furnished by Mr. Levin as an exhibit at one of the depositions. The book was left here by Mr. Levin and there has never been any request by your office to return this document. This document, of course, has no bearing on the information requested in defendant's interrogatories.

EXHIBIT II

EXHIBIT ANNEXED TO AFFIDAVIT

I am also enclosing copies of all of the exhibits to the deposition. Again, no request has ever been made to this office to deliver copies to you of these exhibits. Indeed, there would have been no reason to do so in view of the fact that Mr. Cohen or representatives of his estate, including yourself, have, or have had custody of all such documents.

Sincerely,

Paul Z. Lewis

PZL:met
Enclosures

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Peter I. Feinberg

United States District Court
Southern District of New York

----------x

Esther Friedlander, et ano,	:	70 Civ. 2561 (RJW)
Plaintiffs,	:	Affidavit in Opposition to Plaintiffs' Motion for Class Action Status
-against-	:	
Peter I. Feinberg, et al.,	:	
Defendants.	:	

----------x

State of New York)
County of New York) ss.:

Peter I. Feinberg, deposes and says:

I am an individual defendant in this action, President of defendant Peter I. Feinberg Securities Corp. and a general partner in defendant Drake Associates. I am fully familiar with the facts described herein, and submit this affidavit in opposition to plaintiffs' motion for class action status.

The motion in brief

Plaintiffs' motion should be denied because

(a) Plaintiffs have not timely moved in compliance with Civil Rule 11(a) of this Court -- the motion is made three years after the commencement of this action; the Rule permits a delay of only 60 days;

(b) There is insufficient likelihood of success to warrant the expense and trouble of class action procedures;

(c) Plaintiffs cannot satisfy the requisites of Rule 23(a) (3) or (4) Fed. R. Civ. P.:

-- the claims of the plaintiffs are not typical of the claims of the class;

-- the plaintiffs will not fairly and adequately protect the interests of the class.

(d) Plaintiffs cannot satisfy the requisites of Rule 23(B)(1)(A) Fed. R. Civ. P.:

-- there is no risk of inconsistent or varying adjudications with respect to members of the class;

-- there is no risk of establishing incompatible standards for defendants.

This action relates to events occurring fourteen years ago. To date no "class" member other than plaintiffs has asserted any claims against defendants; and

(e) Plaintiffs cannot satisfy the requisites of Rule 23(B)(3) Fed. R. Civ. P.:

-- questions of law or fact common to the class do not predominate; non-common

questions, including reliance, statute of limitations and punitive damages predominate;

-- a class action is not superior to any other method for a fair and efficient adjudication of the controversy

The Gravamen of this Action

The complaint seeks damages under the antifraud provisions of the federal securities laws in connection with the sale in 1959 and 1960 to approximately 1,100 persons including plaintiffs' deceased father (Raphael Cohen), but not including plaintiffs, of securities of Drake Associates. Drake Associates is a limited partnership formed in 1959 to purchase the Drake Hotel and then lease it back on a net lease basis for 30 years with possible 25 year renewable terms to companies controlled by William Zeckendorf. The offering was made pursuant to a detailed written prospectus (Exhibit A to plaintiffs' moving papers).

The focus of the complaint is the allegation that from October 1959 through January 1960, while the limited partnership interests were being sold, defendants knew but concealed from investors that the Zeckendorf financial empire was in such shaky condition that it would be unable

to meet its lease obligations to Drake Associates and others and that Zeckendorf Hotels would default on its lease with Drake Associates.

Although other misstatements are charged, essentially they flow directly from, and depend upon statements and claimed omissions regarding the financial health of the Zeckendorf financial interests.

The Underlying Facts

The formation of Drake Associates

Plaintiffs' class action papers demonstrate that this case is founded on fantasy, misconception and inexcusable error as to the true facts.

Drake Associates is a limited partnership formed in 1959 to purchase the Drake Hotel for $9 million ($4,500,000 cash over a $4,500,000 first mortgage) from Webb & Knapp, Inc. and to lease the hotel back to Zeckendorf Hotels Corporation. Both Webb & Knapp, Inc. and Zeckendorf Hotels Corporation were among the many real estate interests controlled by William Zeckendorf, a well-known New York City realtor. The purchase and leaseback transactions both took place on January 15, 1960.

The prospectus for Drake Associates was prepared by the law firm of Goldstein, Judd and Gurfein. Whatever

information that law firm required was supplied. The prospectus, including particularly the disclosures relating to Webb & Knapp, Inc. and Zeckendorf Hotels Corporation were carefully reviewed by the staff of the Securities and Exchange Commission and revised in accordance with their recommendations.

In addition to the purchase and leaseback transactions Drake Associates loaned Zeckendorf Hotels Corporation $1,000,000 toward the cost of building and furnishing an annex to the hotel, and gave Zeckendorf Hotels Corporation the right to subject the premises to a construction loan mortgage to raise additional funds required to build the annex. The loan was to be satisfied by completion of the annex within three years from the closing date. Zeckendorf Hotels' net lease was guaranteed by Webb & Knapp, Inc.

No illusions about Zeckendorf's financial situation were created. The Drake Associates' prospectus -- a copy of which Mr. Cohen and the other investors admittedly received -- expressly disclosed (at p. 8):

> "The consolidated balance sheet of Webb & Knapp, Inc. at December 31, 1958 shows a total capital stock and surplus of $25,066,685, subject to a number of commitments and contingent liabilities similar to the proposed guaranty of the net lease of the Hotel. The consolidated statement of income for the calendar year 1958 indicated an operating loss of $9,685,545, less a $3,169,348 reduction

of Federal income taxes for prior years, resulting in a net loss for the year of $6,380,926. Webb & Knapp, Inc. reported to the Securities and Exchange Commission a further loss of $3,495,198 for the six months ended June 30, 1959. Accordingly the value of the limited partnership interests offered hereby should be based primarily upon the value of the Drake, the proposed addition and the results of its operations." (emphasis added).

Between January 1960 and June 1963, the Zeckendorf interests fully performed their obligation to construct an annex to the Drake Hotel. In addition to the $1,000,000 loaned to the Zeckendorf interests by Drake Associates, a $2,000,000 building loan mortgage was obtained and that mortgage was in June 1963 consolidated with the existing mortgage. Thus, the total cost of the Hotel Drake to the partnership was $12,000,000 including the following:

$ 4,500,000	Cash at Closing
4,500,000	First Mortgage
1,000,000	Loan to Tenant
2,000,000	Building Loan Mortgage
$12,000,000	

As will be more fully explained later, the partnership sold the Drake Hotel in June 1964 at a profit -- not at a loss as contended erroneously by plaintiffs.

The collapse of the Zeckendorf empire

The Zeckendorf business interests suffered widely publicized losses in 1962. Drake Associates directly

experienced the impact of these events when Zeckendorf Hotels defaulted on their February 1963 payment to Drake Associates, and, for the first time, Drake Associates was unable to make its March 1 distribution. I so informed the limited partners (See Exhibit 1, annexed hereto).

On March 15, 1963, in a letter to the limited partners (Exhibit 2 hereto), I informed the limited partners of Zeckendorf's default on its February rent installment. In that letter, I referred them to Wall Street Journal stories published on that day and the previous day updating reports that had been circulating for many months about Zeckendorf's financial setbacks. Copies of those stories are annexed as Exhibit 3. I further advised the investors that the partnership would have to suspend distributions, that it was "best to be prepared" for "the worst", and that the hotel industry in New York had experienced a sharp downturn in occupancy which had resulted in "a very substantial loss in the operations of the Drake Hotel."

The recouping of Drake Associates' investment

As soon as the ability of the tenant to pay the rent came into the slightest question, I explored the possibility of a sale of the Drake to safeguard the interests of the partnership. My efforts resulted in a profit to the partnership. Full disclosure was made to all concerned.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Peter I. Feinberg

In a letter to the limited partners on April 4, 1963, I advised the investors that we had entered into negotiations with Webb & Knapp, Inc. to sell the hotel back to them (Exhibit 4 hereto). On May 15, 1963, I advised the investors of an action by the partnership to collect overdue rent (Exhibit 5 hereto). Thereafter on July 26, 1963, I advised the investors that the partnership had entered into a contract for sale of the hotel to a nominee of Webb & Knapp, conditioned on and subject to obtaining written consents of the limited partners (Exhibit 6 hereto). Five days later, on July 31, 1963, Raphael Cohen delivered to us his notarized statement of consent to the sale of the hotel (Exhibit 7 hereto). At no time did he claim he had been defrauded.

On August 9, 1963, I again advised the investors of the terms of the sale, urged them to return their consents, and warned them of the uncertain financial status of the Zeckendorf interests (Exhibit 8 hereto).

There were a number of adjournments of the closing (See Exhibit 9 through 16). In the meanwhile distributions to the investors were brought up to date through December 31, 1963 (See Exhibit 13 hereto), and such 10% distributions referred to in the prospectus were continued until the closing of the sale of the property.

Finally the closing of the sale of the hotel took place on June 3, 1964. Under the sale, the hotel was sold to Lawton General Corp., a subsidiary of Loew's, for $13,000,000. $6,000,000 was paid by the purchaser taking subject to the $6,000,000 balance on the consolidated first mortgage. The $7,000,000 balance was paid $2,000,000 in cash and by delivery of a $5,000,000 purchase money mortgage, bearing interest at the rate of 5% per annum and due June 3, 1974 (See Exhibits 17 and 18). Since then, interest paid by Lawton under the purchase money mortgage has been distributed pro rata and will be continued to be distributed until the mortgage is paid up.

As a result of the sale to Lawton, the investors in Drake have not only recaptured their original investments but in addition all will have made a profit in excess of what this lawsuit could bring them.

The Untimeliness of Plaintiffs' Class Action Motion Demonstrates the Unfitness of Plaintiffs to Represent Any Alleged Class Herein.

I am advised by counsel that Rule 23 requires that a motion for class action status must be made "as soon as practicable" after the commencement of the action. I am further advised that the Rules of this District require that such a motion be made within 60 days of the commence-

ment of the action and that failure to proceed timely shows unfitness of the plaintiff to represent the alleged class.

The case at bar was commenced in June 1970. No class action motion was made until February 1974. Such untimeliness alone mandates denial of plaintiffs' class action motion.

As appears from the annexed affidavit of my attorney, Barry H. Singer, the attempts by plaintiffs to excuse or justify their dilatory failure to proceed are completely without merit.

This Action Has No Color of Validity

I am advised and believe that plaintiffs' claims whether or not prosecuted as a class action have no merit whatsoever. There were no misrepresentations or omissions. The investors in Drake Associates have not been damaged. Any possible claim is barred by applicable Statutes of Limitations.

The claims described in the moving affidavit of plaintiffs' counsel are contrary to undisputable facts and documents. The fantasies and inaccuracies contained in the moving papers also demonstrate unfitness to represent any class of plaintiffs herein.

AFFIDAVIT OPPOSING MOTION
PURSUANT TO RULE 23
By Peter I. Feinberg

There were no misrepresentations or omissions.

In his moving affidavit, plaintiffs' counsel purports to specify alleged misrepresentations and omissions. Item (a) alleges an omission of the dire need of Zeckendorf Hotels Corporation and Webb & Knapp, Inc. for cash and a claim that the lease required Zeckendorf Hotels Corporation to pay rent in excess of the net income which tenants can reasonably anticipate. There was no such omission; the cash position of Zeckendorf Hotels Corporation and Webb & Knapp, Inc. is accurately set forth in the financial statements annexed to the prospectus, and a caveat concerning the financial difficulties of Webb & Knapp, Inc. was specifically set forth at page 8 of the prospectus and is quoted above. It is utterly untrue that the rental was in excess of the net income which could be generated from the operation of the Hotel Drake. Apparently plaintiffs' counsel is looking only at the figures based upon the Hotel Drake without the annex. Even without the annex, Zeckendorf Hotels Corporation paid the rent during the period when the annex was being constructed. The partnership received from Zeckendorf Hotels Corporation all rent due under the lease. The limited partners received their 10% distributions during the entire period of the partnership's ownership of the hotel.

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I am informed and believe that Lawton General Corporation has successfully and profitably operated the hotel since acquiring it in 1964. Lawton General has promptly made all payments required on the first mortgage and the purchase money mortgage.

Plaintiffs' counsel also claims that the Drake Hotel property was purchased for a price in excess of its reasonable market value. In my opinion, the land alone upon which the Drake Hotel stands, at the corner of 56th Street and Park Avenue, was worth more than the purchase price. Plaintiffs' claim is also belied by the fact that even during a period of hotel business slump we were able to sell the Drake Hotel for $1,000,000 more than the total investment by the partnership in it.

The claim is made that the underwriter formed by my partners and me for the purpose of this transaction was a sham and did not undertake proper and adequate investigation. This is sheer fantasy and nonsense. The general partners made a thorough investigation of this situation and the $1,000,000 profit earned by the partnership despite the collapse of the Zeckendorf financial interests fully justifies the investment made on the basis of that investigation.

The other alleged misrepresentations and omissions pertain to the same subjects and are groundless for the same reasons.

Similarly, the portion of the moving affidavit which purports to summarize the problems which developed is rife with error and inaccuracies which demonstrate the unfitness of plaintiffs to represent any claims here.

It is stated that the financial structure of the Drake venture was never attained by Zeckendorf or anyone else. The facts are that, even during the construction of the annex, Zeckendorf Hotels Corporation did meet its rent payments and that the purchaser of the Drake Hotel has operated the hotel on a very profitable basis after payment of the amounts required by the first mortgage as well as the purchase money mortgage. The first mortgage has been reduced since June 1964 from about $6,000,000 to less than $3.5 million.

It is also stated by plaintiffs that the general partners caused the syndicate to take the hotel over and that the hotel lost money. This is also wrong. Drake Associates never took the hotel over. The hotel was sold. The documents sent to plaintiffs' decedent and found in the decedent's file and marked for identification in this

action make clear that the partnership never took the hotel over or operated it.

Finally, it is stated that the hotel was sold at a loss; the fact is that the hotel was sold at a $1,000,000 profit.

These errors show a fundamental lack of understanding of the basic financial transactions upon which plaintiffs purport to sue. Such fundamental errors are incompatible with adequacy to represent any class herein.

There Was No Damage to Drake Associates Investors.

Each investor in Drake Associates who has retained his limited partnership interest will have received at the time of the liquidation of the partnership in June 1974 more than plaintiffs seek to recover for the investors in this lawsuit.

In this lawsuit, the complaint seeks a recovery of all sums paid by the investors together with interest from the date of each investors' purchase. If the Court were to find a basis for recovery and that the Statute of Limitations does not bar the claim, each investor would nevertheless recover less than the results of the Drake Associates partnership.

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Annexed hereto as Exhibit 19 is a schedule showing what the holder of each $10,000 unit would be entitled to recover assuming an investment on December 31, 1959 and a recovery of judgment on June 30, 1974. The schedule takes account of the fact that there was returned to each $10,000 investor, the sum of $3,216.67 in June 1964.

Annexed hereto as Exhibit 20 is a schedule of the amount that each $10,000 investor will have recovered when the principal of the purchase money mortgage is paid on or after June 3, 1974; that amount is $17,730.00.

Thus, each Drake Associate investor will by reason of the partnership's success, realize on his investment $1,010.00, more than if he were to receive what is sought in the complaint, i. e., "all sums paid by ... [sic him] ... for said securities, together with interest from the date of each plaintiff's respective purchase."

The complaint also refers to "all other losses and damages sustained as a result of the action by defendants and their failures to fulfill their undertakings and obligations to plaintiffs and members of the class". Neither I nor my attorneys, can be certain what this vague language refers to.

The general partners did not guaranty* that the partnership would retain the building or that the partners would continue to receive a 10% return on their investments

*(sic)

indefinitely. On the contrary, each limited partner investor was specifically informed of the right of the general partners to sell the Drake Hotel at any time. The only limitation upon that right was the representation of the general partners that they did not intend to sell the Hotel Drake without obtaining the consent of 60% in amount of the partnership interests. The prospectus, a copy of which is annexed as Exhibit A to the papers, specifically states on page 7:

> "A limited partner has no right to control the management and operation of the business. Management is the sole responsibility of the general partners. Notwithstanding this general principle, the general partners have represented that they do not intend to sell the Hotel Drake without obtaining the consent of 60% of the partnership interests."

The Drake Hotel was sold by the general partners only after obtaining the express written consent of 60% in amount of the partnership interests; included was the express written consent of Raphael Cohen.

Up to the time of the sale, Raphael Cohen had received with respect to his partnership interest, every penny which he could expect from the projections set forth in the prospectus. By reason of the sale, Raphael Cohen received one-third of his money back, and the right to receive more than the balance with interest. Thus, in this

respect also, Raphael Cohen received everything that was represented to him plus a profit which was not projected in the prospectus and which Raphael Cohen had no legal right to recover and would not have recovered but for the hard work done in behalf of the investors by myself and the other general partners.

Thus, Raphael Cohen and the other limited partner investors have not been damaged and will have obtained from their investment in Drake Associates more than they could from what is sought in the lawsuit. They have no possible claim that they have been injured or damaged in any respect.

Any fraud claims are barred by applicable Statutes of Limitations.

As noted above, the focus of the complaint in this lawsuit is the allegation that at the time when the limited partnership interests were being offered, defendants knew but concealed from the investors that the financial condition of the Zeckendorf interests made it questionable whether the tenant could be expected to pay the rent and that it was not unlikely that Zeckendorf Hotels would default on its lease with Drake Associates.

Although other misstatements are charged, essentially they flow directly from, and depend upon statements and claimed omissions regarding the financial health of the

Zeckendorf financial interests.

Since the limited partnership interests were all purchased no later than January 15, 1960, and since Zeckendorf's financial difficulties were widely publicized on a daily basis throughout 1963, 1964 and 1965, each purchaser claiming fraud would have an individual, practically insuperable burden of proving that he did not know and should not have known of all of the true facts by June 1968, two years before this lawsuit was commenced.

Plaintiffs Cannot Satisfy the Requisites of Rule 23(A) (3) or (4) Fed. R. Civ. P.:

The claims of plaintiffs are not typical of the claims of the class.

Plaintiffs' claims are atypical of the claim of the majority of the putative plaintiff class for the following reasons:

(1) As set forth above, the majority of the class has profited as a result of their investments in Drake Associates; plaintiffs have lost money only because they sold their partnership interest in 1971. Thus, the damage, if any, to plaintiffs was caused by their ill-advised sale of their interest -- not by the purchase of their decedent, Raphael Cohen. The number of original

limited partner investors in Drake Associates was 1,074. Even prior to the sale of the Drake Hotel by the partnership, more than 100 of those investors had sold or transferred their interests. Thereafter, more than 400 additional limited partners, including the plaintiffs herewith have sold or transferred their interests. If the investors who sold or transferred their interest had retained those interests, they would, of course, not have been damaged. If any loss occurred to them, it was because of their unwillingness to stay with the investment, a risk of loss which every limited partner takes; and

(2) Plaintiffs' claims are not even typical of the claims of those who have sold their Drake interests. The reasons why these limited partners sold are individual.

It is plain that plaintiffs who sold out are not representative of the limited partner investors who have retained their investments. Nor can plaintiffs fairly represent the more than 500 investors who have for different individual reasons determined to liquidate their investments by transferring their limited partnership interests.

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Plaintiffs Cannot Satisfy the Requirements of Rule 23(B) (1) (A) Fed. R. Civ. P.:

There is no risk of inconsistent or varying adjudications with respect to individual members of the class or adjudications which would establish incompatible standards for defendants.

As pointed out above, Drake Associates was syndicated in 1959 and the last partnership interests were purchased no later than January 1960. In early 1963 the limited partners were informed of Zeckendorf's difficulties and partnership distributions were thereafter from time to time delayed. In 1964, pursuant to consent of more than 60% of the limited partners, the building was sold, approximately one-third of each partner's investment was returned to him, and the return on the balance was reduced to 5%. From 1962 through 1965, the financial difficulties of Mr. Zeckendorf and his companies were described almost daily in the newspapers.

Yet no investor, not even Raphael Cohen, ever claimed that he was misled. Not one of the 1,100 investors has sued.

It is obvious therefore that now, more than 14 years after the event, there is no risk of any lawsuits, inconsistent adjudications or the other causes set forth in Rule 23(b) (1) (A).

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Plaintiffs cannot adequately represent any putative plaintiff class.

Plaintiffs waited three years before commencing discovery in this action. Plaintiffs waited three and one-half years before moving for class action determination.

As shown above, plaintiffs (or their counsel) have completely misapprehended the facts surrounding the purchase of the Drake Associates shares. Additionally, plaintiffs are handicapped by the death of Raphael Cohen, who was the only person with actual knowledge of the events surrounding his purchase of the Drake Associates securities and the crucial issues of reliance and the Statute of Limitations.

It is striking that no limited partner investor has asserted any claim with respect to the prospectus of Drake Associates. Despite the fact that the Drake Hotel was sold by the partnership and part of the investment was returned in 1964 and that since then, the partners have received only 5% on the unreturned portion of their investment, no limited partner investor has complained even after exposure to the years of publicity regarding the financial downfall of the Zeckendorf empire. It was only after Raphael Cohen died that his executors determined to commence this meritless action. They are representative of no investor other than perhaps Raphael Cohen and they should not be permitted to maintain a class action.

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Individual Issues of Law and Fact Predominate Over Common Quests of Law and Fact.

I am advised by counsel and believe that in view of the more than ten years which elapsed from the time of the syndication to the bringing of this lawsuit and the even longer periods which elapsed to the present time without complaint by any investor, each investor in Drake Associates would have a unique and overwhelming burden of proof to meet to show that he did not know and could not have known of any fact relative to the factual focus of this lawsuit by June 1968. I am advised and believe that I would be entitled to separate discovery and to a separate trial as to each of the claimants, and that the issues on the Statutes of Limitations which would have to be tried separately before a jury would entail so much additional time and confusion as to wipe out any possible economy which could arise from the treatment of this litigation as a class action.

A class action is not superior to any other method for the fair and efficient adjudication of the controversy.

I am further advised that separate trials of the Statute of Limitations issues and the issues of reliance and damages before a jury other than that which hears the common issues would result in confusion and would violate my constitutional right to trial by jury in this action.

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Thus, in this action the individual issues which would have to be tried separately as to each member of the alleged class predominate over any common issues alleged to exist. In no way is a class action superior to the other available methods for the adjudication of any possible controversy with other alleged members of the class, none of whom have seemed fit to come forward at any time.

Conclusion

Plaintiffs' class action motion is inexcusably untimely. This fact and plaintiffs' misunderstanding and erroneous conceptions with respect to the indisputable and documented facts makes it clear that plaintiffs are unfit to represent any class with respect to the claim set forth in their complaint.

There is no likelihood of success sufficient to warrant the expense or trouble of a class action. Individual decisive issues predominate over the alleged common issues.

Plaintiffs' class action motion should be denied.

(S.G.D.) Peter I. Feinberg
Peter I. Feinberg

Sworn to before me this
8th day of March, 1974.

Notary Public

MORTON PORWICK
Notary Public, State of New York
No. 60-8413960
Qualified in Westchester County
Cert. filed in New York County
Commission Expires March 3, 1974

REPLY AFFIDAVIT OF IRA JAY SANDS IN SUPPORT OF RULE 23 MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER FRIEDLANDER, etc.,	:	REPLY AFFIDAVIT ON BEHALF OF PLAINTIFFS SUPPORTING THE CLASS ACTION MOTION
Plaintiffs,	:	
-against-	:	
PETER I. FEINBERG, et al.	:	
Defendants	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

IRA JAY SANDS, being duly sworn, deposes and says:

1. This affidavit is in response to the affidavits of Peter I. Feinberg, a defendant herein and Barry H. Singer, Esq., one of his attorneys.

2. The opposing affidavits seek to re-argue the Statute of Limitations question, as if it had not been briefed and argued previously in depth. The opposing affidavits are written with an air of personal venom for plaintiffs and counsel, a situation which completely surprises me in this litigation.

3. Very many of the exhibits which unduly pad the opposing affidavits are solely applicable to the question of

notice of the frauds and a subject which has been thoroughly argued about in the Motion for Summary Judgment. Nevertheless, even the padded exhibits, strongly support plaintiffs' argument that there was never any notice to the class of the original prospectus frauds claimed herein but rather red herrings to inform the investors of problems but to steer them clearly away from any thought that the original prospectus was fraudulent.

4. For ease of the court and counsel, I will attempt to deal with the opposing affidavits seriatum. I will refer to page numbers since defendants have neglected to number their paragraphs.

5. Pg. 2 - Reliance is not an issue in this case, as detailed in the moving Memorandum of Law. One does not rely upon omissions in a prospectus. Reliance has been contracted away by the fact that every investor in Drake Associates signed a purchase form in which he acknowledged that he received the prospectus and relied only on the prospectus and nothing else. The defendants cannot now claim lack of reliance, since it was they who insisted that every investor execute that purchase form. Furthermore, the cases question whether reliance in such a situation is a prerequisite since reliance is presumed.

6. The Statute of Limitations question will not be an individual question of fact and in their papers on the Statute

of Limitations motion, at no time did the defendants claim that they privately informed any single member of the class of the frauds. Their support of their motion to dismiss upon Statute of Limitations grounds was based upon the public documents which they mailed to investors and the public press. Therefore any question of Statute of Limitations is based upon the identical supporting facts and is a common question to all members of the class. In fact, it was agreed at pre-trial conference that upon trial, the question of Statute of Limitations would be presented first to a jury. Defendants' counsel all agreed. They would now seem to be retracting their consent of only a few weeks ago.

7. Pg. 3 - The question of punitive damages is certainly not one which is individual to each member of the class.

8. Pg. 3 - Mr. Feinberg mistakenly claims that the plaintiffs are not members of the class but rather that their late father is. The plaintiffs are representing their father as his executors.

9. Pg. 3 - Defendants are totally incorrect in attempting to give us the "focus of the complaint". Plaintiff complains that the defendants did not make proper investigation of the Zeckendorf background and the Zeckendorf deal before they entered into the purchase and lease back transaction in 1959-60. Plaintiffs indicate that defendants had the fiduciary

obligation to properly investigate and should have informed the plaintiffs of their failure to make such proper investigation. In that respect, the prospectus omitted the fact that the sham Feinberg-owned underwriter and the general partners themselves did not properly investigate the proposed deal. They did not disclose nor properly investigate the obvious deficiency in income which the Zeckendorf operation would have in the operation of the Drake Hotel. Although at another point in his affidavit, Mr. Feinberg glibly states that Zeckendorf did not lose money, in effect, his own exhibit 6 shows that Zeckendorf had operating losses in each year and that the rent from Zeckendorf to Drake Associates was usually in arrears. This is completely contradictory of what Mr. Feinberg tells us in his affidavit.

10. Pg. 3 - The complaint not only alleges the failure to disclose the Zeckendorf plight in depth, the fact that the hotel could not throw off enough money for Zeckendorf to make profits after paying his rent and other obligations and of the fact that the general partners and their specialists did not completely investigate the situation before advising the investors to purchase units.

11. Pg. 4 - Plaintiffs strongly resent the very obvious implication of Mr. Feinberg's affidavit in referring to the preparation of the prospectus "by the law firm of Goldstein, Judd and Gurfein". T gether with other statements having been made by counsel, the intent is too transparent.

12. Nevertheless, whatever law firm prepared the prospectus, it was only prepared based upon information supplied by the defendants. To follow the possible logic of defendants falacious argument, if a prospectus is prepared by a "good" law firm, then it should be unimpeachable and not be attacked for omissions or misrepresentations. From litigative experience, the court and counsel know full well that every day prospectuses are successful attacked for omissions and misrepresentations. Many of such prospectuses have been issued by outstanding corporations represented by outstanding counsel.

13. Similarly, the fact that the prospectus might have been"carefully reviewed" by the SEC does not give the prospectus any protection whatever. If this were the case, the thousands of successful attacks upon prospectuses would be lost. Non-disclosure and misrepresentation is not protected by the use of good counsel, good accountants or SEC review. In fact, we know of the particular language of the SEC which completely negates such protection.

14. Pg. 5 - Again the Statute of Limitations question of Zeckendorf's financials is discussed in detail although it is now moot for this motion. Nonetheless, the discussions in the Drake prospectus concerning Zeckendorf did not provide any clue or inkling as to a fraudulent disclosure or omission. If this point is deemed significant by the court, I would incorporate herein by reference, the

plaintiffs' affidavits in connection with the recently decided Summary Judgment motion.

15. At the recent pre-trial conference, Feinberg's counsel showed obvious dramatic displeasure with the decision of Judge Ward on the Limitations motion. He sought to re-argue. The court rejected it. He now attempts to do it again.

16. Pg. 6 - Here and at other portions of his affidavit, Mr. Feinberg attempts to deftly convert figures and show profit to "all" investors. First, when Drake Hotel was sold in June 1964, a 10-year, 5% mortgage was taken back for the preponderance of the price. No one can say that the mortgage should have been valued at full face. Actuary tables give present value of a 10-year mortgage at 5% at .6139132 or only about 61¢ on the dollar. So the sale did not result in realty or acturial recognized profit. As an old realtor, Mr. Feinberg must know this too.

17. But what of those 50% of the original 1000 investors who sold their units and did not participate in income from that 10-year mortgage? They received varying small amounts for their original $10,000 unit. All these suffered losses not recouped in any manner by proceeds distributed when the hotel was sold in 1964, or from mortgage distributions thereafter through 1974. They certainly failed to receive what they expected from the prospectus. Raphael Cohen was one of those.

18. But, the other 50% of the investors who did not sell their units, also suffered monetary loss as will be disclosed in response to the appropriate portion of Mr. Feinberg's affidavit.

19. Pg. 6 - bottom. Here again the Statute of Limitations question is discussed by Mr. Feinberg. Yet, the newspaper stories and material mailed to the investors not only failed to hint at a fraudulent prospectus in 1959-60, but on the opposite side these articles and writings only served to divert any investor's attention from the possibility of fraud in the prospectus.

20. Pg. 8 - top. Mr. Feinberg claims that at no time did Raphael Cohen "claim he had been defrauded". Of course Mr. Cohen did not so claim because he did not know that he had been defrauded at that time.

21. Pg. 9 - Mr. Feinberg is incorrect (I obviously will not stoop to use the innuendos that Mr. Feinberg and his counsel utilized in their affidavits about the reasons for a difference in the view of the facts) when he claims that all the Drake investors "will have made a profit" and that they "recaptured their original investments". As stated, the 50% of the investors who sold their units lost money. The other 50% may recapture if one gives 100% face credit to the 10 year 5% mortgage. Why does Mr. Feinberg say "all".

22. Pg. 10 - Mr. Feinberg again attempts to argue the Statute of Limitations.

REPLY AFFIDAVIT OF IRA JAY SANDS
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23. Pg. 10 - Mr. Feinberg's language is a little crude in the second paragraph on page 10 when he refers to the "unfitness to represent any class of plaintiff herein".

24. Pg. 10 - bottom. Although he now purports to be arguing the merits of the false prospectus question, Mr. Feinberg is again arguing points raised by both parties in the Statute of Limitations motion, namely whether the Zeckendorf financial plight was fully set forth for the investors. The court determined that this was a question of fact for the jury. Nevertheless, the financial statements in the prospectus deftly omitted any expense items upon the claim that they would not be applicable to operations in the future. Nowhere in the prospectus or the financials was there a statement or any details of the fact that Zeckendorf had been hypothecating ownership and leases of other hotels in order to raise money. There is no statement that Zeckendorf was using the gimmick of sale-leaseback to sell properties at inflated values and lease them back at inflated rents. This was taken by many to be nothing more than a new borrowing approach rather than a true sale-leaseback because in case after case, it later developed that Zeckendorf could not carry the rent he had undertaken to pay for the property or the hotel. The property just did not throw off enough money for Zeckendorf to be able to service his leaseback obligations in deal after deal. Plaintiffs have indicated that to have been fair, the prospectus should have disclosed

that Zeckendorf was making such inflated sale-leasebacks in dozens of situations. At least if the prospectus had disclosed the numerosity of such sale-leasebacks even without the use of the description "inflated", plaintiffs would perhaps not be in as strong a position. But the prospectus was totally silent on that method of Zeckendorf operation which the general partners had known of and with which they were now dealing in connection with the Drake Hotel.

25. Nor did the general partners disclose the "dollar need" of Zeckendorf for fluid money. If the general partners did not conduct such an investigation of Zeckendorf's method of doing business, then they should have disclosed that in the prospectus; for a limited partner had the right to purchase based upon his anticipation that his fiduciaries had conducted a thorough investigation. After all, the fiduciaries described their background and expertise in the prospectus. This description was for the purpose of saying to the investors "rely upon my judgment and experience".

26. Pg. 11 - top. The Feinberg double-talk is evidenced when he states that the Hotel Drake "could" have generated income in excess of the rental obligation. Mr. Zeckendorf"could"have flown to the moon at that time also, but he did not. The sum and substance of the financial operation was that the Hotel did not generate anywhere near the necessary income. Mr. Feinberg's exhibit 6 discloses that clearly.

27. Pg. 11 - top. Mr. Feinberg is upset that we are only looking at the figures "based upon the Hotel Drake without the annex". But the annex was not in existence at the time of the lease and therefore we could only look at the Hotel without the annex. Was it the intention of the general partners that Zeckendorf would pay Drake Associates back in its own money? If that was the case, then this should have been fully disclosed.

28. Pg. 11 - Mr. Feinberg is not frank when he states that the limited partners received their 10% distribution during the entire period of the partnership's ownership of the Hotel. Here again, he is guilty of "omissions" and "misrepresentations". Not only do the facts disclose that the limited partners were not paid their distributions during a period of time in order to build up a kitty and working capital to permit Drake Associates to be able to take over operation of the Hotel from a defaulting Zeckendorf, but Mr. Feinberg's exhibit 13 discloses that after the property was sold, the investors then were paid back from the capital received on the sale, the missing distributions which they had not previously received. Thus, it is unfair not to disclose that the distributions paid late came from the investors' own money and not from income or cash flow of the operation of the property or the ownership of the property.

29. Pg. 11 - Also Mr. Feinberg does not give full disclosure when he tells us that the partnership received from

Zeckendorf all rental under the lease. If he were to read his own exhibit 6 and disclose that information on page 11, he would have had to add that the Zeckendorf rent was received late, with substantial continuous arrears, etc., etc.

30. Mr. Feinberg is trying to make the deal look as if it was such a good one for the investors. However, he neglects to examine his own communications to his investors in which he attempted to scare the daylights out of the investors. Some of the exhibits which he has annexed to his affidavit attempt to harass the investors into consenting to the sale of the Hotel with the alternative of losing everything. (Yet there was not a single word hinting at a fraud.)

31. Pg. 11 - Mr. Feinberg's belief that Lawton General Corporation successfully operated Drake Hotel since 1964 also fails to disclose that the financial obligation of Lawton is far less than that which Zeckendorf had to Drake Associates. Lawton is not required to pay the sizable rent to Drake Associates plus mortgage servicing. The "nut" of Lawton is far lower and its break even point far less.

32. Pg. 11 - Mr. Feinberg attempts to beguil us by claiming that he sold the Hotel for $1 million more. We all are sufficiently sophisticated to know that leverage frequently serves to permit of a higher face price, but paid out over an extended period. This is a very common real estate acquisition method sought by the experienced realtor. Also Mr. Feinberg neglects to state on page 11 that the purchase

price was in a payout over 10 years, without guarantee or security.

33. The investors also now have no right to any benefits of refinancing or any growth whatsoever.

34. Pg. 12 - Despite Mr. Feinberg's double talk as to the financial structure of the Drake venture, it is correct that the financial projection and the financial structure were never attained by Zeckendorf or by anyone else. At no time did the Hotel under Zeckendorf operation reach the projected financials. When Zeckendorf defaulted, at no time did the investors receive what they had bargained for in believing that the general partners gave them the truthful picture in the prospectus.

35. I have previously referred to the fact that Lawton has a lower "nut" in its operation, but the investors do not benefit.

36. Pg. 12 - bottom. The fact that Zeckendorf may have met its rent payments during the construction of the annex at the initial stage of the venture indicates that Zeckendorf paid its rent from the purchase price for the Hotel which it received from Drake Associates. After Zeckendorf's collapse, we learned that this was the method by which Zeckendorf operated, namely, to sell the property and then to pay the rent for a period of time out of the proceeds which Zeckendorf received by selling the property. Yet Mr. Feinberg is attempting to deceive us into thinking that

Zeckendorf paid the rent from profits of his operation of Drake Hotel, despite the fact that Mr. Feinberg's exhibit 6 indicates that Zeckendorf lost money each year.

37. It must be emphasized here that plaintiffs have never been able to get discovery from these defendants, despite attempts to do so over the years. One excuse after another developed, some of which excuses were logical, such as the threshold question of Statute of Limitations. Discovery of the Zeckendorf financial operations was first barred by bankruptcy order and then barred as a practical measure by nonavailability of records. Although it has been logical that the general partners would have received a copy of the Zeckendorf operations statement for the Hotel, this was not made available to plaintiffs. Thus, at this juncture, plaintiffs have been severely hampered by the unilateral unavailability of some proof to contradict certain clever statements made by the defendants. Examples are shown in Mr. Feinberg's discussion of Zeckendorf having operated the Hotel at a profit and Mr. Feinberg's contradictory exhibit 6 in which he had informed the investors that Zeckendorf had operated at a loss. The court should be made aware of the fact that plaintiffs are hampered by this lack of discovery.

38. Pg. 13-14. The question of profit to the investors has previously been discussed. It is also to be noted that exhibit 20 which purports to indicate moneys to

be received on judgment, fails to include the compounding factor for the interest which was not received by the investors. The compounding factor over a 14 year period is very substantial. Furthermore, the cases hold that a violating defendant may not retain his own profits in the venture in which he performs such conduct. Thus the damages to the plaintiffs and class would include the profits made by the general partners.

39. Furthermore, we have already touched upon the fact that those investors who sold their units at different times, did not receive the subsequent distributions and were left with substantial losses. Mr. Feinberg knows this. The matter has been discussed between counsel. Thus, his total lack of recognition of the problem on page 14 is surprising.

40. Pg. 15 - Mr. Feinberg attempts to make ground by the fact that the investors permitted him to sell the Hotel. If we look at Mr. Feinberg's exhibits which scare the investors and intimidate them, we question whether any reasonable investor felt that he had any choice but to knuckle under to Mr. Feinberg.

41. Pg. 15 - Although it is true that the general partners did not guarantee that Drake Associates would retain the property, they did guarantee that the prospectus contained full and adequate disclosure. The investors bought into the deal upon that representation. The investors did not purchase in anticipation that the property would be sold. If

the lack of disclosure was connected with the later decision to sell, then the acquiescence of the investors to sell does not cure the original violation.

42. Pg. 15-16. Mr. Feinberg states that Raphael Cohen received 1/3 of his money back "and the right to receive more than the balance with interest". What does that mean? It is to be noted that after Raphael Cohen died and Abraham Cohen sought information from Mr. Feinberg, he was rebuffed by total silence over a protracted period of time. Only after intercession, was he asked for certain estate papers. Until completion of his sale, he received no distributions and he received no literature! He was treated with solitary confinement because he was rippling the water! Mr. Cohen did not intend to sell his unit, but in view of the harassment which took place as above described, I am informed that it became the decision of the executors to salvage what they could at that time. Is that why many other investors sold? Did many investors sell because of the scaring letters written by Feinberg, some of which are annexed as his exhibits?

43. Mr. Feinberg is inaccurate when he states that Mr. Cohen and the other limited partner investors had not been damaged and that they will obtain more than they could have. How does Mr. Feinberg calculate that with respect to the 50% who sold their units at a loss? Limited research has not disclosed anyone who sold his unit at a profit! In fact,

there are two broker-dealers who specialize in resale of the old limited partnership units. One broker-dealer distributes a price chart from time to time. We have noted that Drake Associates units have sold at a discount from face. Perhaps that is because it is a depleting asset with the end to come in June 1974.

44. On the other hand, in 1959-60 when the investors bought their units, they did not buy a depleting asset but they bought something which they anticipated would probably go on forever. Certainly there was no guarantee, but there was a guarantee of propriety. In order to salvage because of the impropriety, the investors were forced to take a depleting asset. Did they then not lose anything?

45. The investors purchased units with the anticipation of a return each year for an endless period. By receiving their money back plus meager interest, all to end in June 1974, did the investors not lose anything?

46. Pg. 16-17 - Again the Statute of Limitations question is argued as a specific section.

47. Pg. 17-18 - Here Mr. Feinberg claims the Cohen representation is not typical. He blames Cohen for the "ill-advised sale". He admits that prior to the sale of the Drake Hotel "more than 100" investors sold their units. This was during the height of the Zeckendorf troubles and during the height of the scary letters written by Feinberg. But it is

illuminating to now hear that even after the sale, "more than 400 additional limited partners" sold their units. Thus it seems to be obvious that these 400 people who sold after Lawton took title, were disappointed in the fact that they were not receiving what they originally bargained for in 1959-60 prospectus.

48. Pg. 18 - Defendants attempt to twist to indicate that there are different questions as to why investor sold his unit. Yet the complaint is not based upon the sale of units but based upon the purchase of units. The date of sale determines the amount that each investor may have recovered from the distributions. The date and reason for the sale have no connection whatever with liability. They only and solely will permit the Master or Magistrate to calculate the amount of money which the class member received in reduction of his claim. This is the mechanics by which so very many of similar class claims have been distributed.

49. Pg. 18 - Since there is no claim as to the sale or non-sale of the units by the investors, but only a claim concerning the purchase by all of the investors from the very same prospectus, there is no reason why this action should be handled differently from so very many other actions of a similar nature concerning real estate syndications and real estate companies, where a present holder or a holder who already sold his investment, can fully represent all of the investors who purchased the identical securities from the identical prospectus in the identical offering.

50. Pg. 18-19 - Mr. Feinberg is incorrect in claiming that plaintiffs waited three years before commencing discovery. The moving papers indicate to the contrary. Furthermore, Mr. Feinberg does not treat with the Zeckendorf court stay.

51. Pg. 19 - Nor is Mr. Feinberg accurate in referring to the need to bring back the late Raphael Cohen because he allegedly was the only one with actual knowledge. It has been clearly shown in the depositions that Raphael was a purchaser of the units in the same way as every purchaser of the units. There has never been any inkling that Raphael had any indication of knowledge of the nature that no other investor had. Nor has there been indication that he had knowledge of any of the events different from other investors. As to his purchase, the documents which he signed indicate that he purchased after receiving the prospectus and relying upon the prospectus and nothing else. This was the document presented to him for signature by the Feinberg group. It was the identical document presented to each Drake investor. It covered the issue of reliance. The question of Statute of Limitations has been adequately briefed and will be similarly presented to the jury. Thus there is no need to have a live Raphael Cohen in this action when his son and daughter, with their substantial personal backgrounds and interest, have adequately represented him.

REPLY AFFIDAVIT OF IRA JAY SANDS
IN SUPPORT OF RULE 23 MOTION

52. Pg. 19 - Mr. Feinberg treats with the fact that no other limited partner has asserted any claim. Were the limited partners informed as to the contents of Raphael Cohen's claims as expounded by his executors? Were the limited partners ever informed of their right to bring an action based upon a fraudulent prospectus? Perhaps no other limited partner has yet discovered that fraud was practiced upon him. In any event the cases speak contrariwise to what Mr. Feinberg states of the necessity that other limited partners have intervened.

53. If the annual reports of Drake Associates since commencement of this action were properly inclusive of pertinent details, they would have had to disclose to the investors that an action had been commenced. Since plaintiffs were disenfranchised by Feinberg at an early date, plaintiffs do not have privy to such documents and the same have not been produced for discovery.

54. If the investors were informed of the pendency of this action, then they full well had the right to depend upon the representation of Cohen and they do not have any obligation to move further.

55. Pg. 19 - Mr. Feinberg's gratuitous statement as if he was privy to the facts personally, that Raphael Cohen's executors determined to commence the action only after Raphael Cohen died, was not in accord with the facts as developed on the Summary Judgment motion.

REPLY AFFIDAVIT OF IRA JAY SANDS
IN SUPPORT OF RULE 23 MOTION

56. Pg. 20-21. Mr. Feinberg does not comport to the cases or to logic in his confusing statement that each investor would have to affirmatively prove that he did not know and could not have known of the facts by June 1968. I would presume that Mr. Feinberg is referring to the fact that a fraud was committed. Yet Mr. Feinberg is inaccurate and decisions indicate that even questions of Statute of Limitations such here presented are common questions of fact. There need not be a separate trial as to each claimant. Particularly since the question of disclosure as presented by the defendants in their motion for Summary Judgment was based not upon individual discussions between the defendants and any one or more investor, but rather upon publicly distributed documentation; the question of discovery of facts of Statute of Limitations points is certainly common to all the investors and will go before one jury at one time, perhaps if possible on an agreed state of facts.

57. Pg. 21 - We have already dealt with the question of reliance as not applicable here and having been waived by the defendants in their Purchase Form. It is surprising to see the affidavit claim that the question of damages will require separate trials since damages are merely susceptible to mathematical computation once the theory of damages has been established.

REPLY AFFIDAVIT OF IRA JAY SANDS
IN SUPPORT OF RULE 23 MOTION

ADDENDUM CONCERNING FEINBERG EXHIBITS

58. Exhibit 3 is a letter to the investors indicating that distributions must cease because the funds must be obtained by the general partners to "provide working capital to operate the hotel". Also on page 2 of the letter that the investors had best be prepared for bad eventualities.

59. Exhibit 6 at the bottom indicates that no distributions will be made in order to build up funds. The letter is an attempt to "bring you to date", yet there is no mention of frauds of any nature. There was mention that the funds would be accumulated to cover taxes, carrying charges on the mortgage and other incidental expenses.

60. Exhibit 7

> "(c) Our lessee has been operating this hotel at a substantial loss for over three (3) years and for the past six (6) months there have been constant rent arrears. As of this writing, the June and July rent is unpaid;"

61. The above quotation contradicts Mr. Feinberg's statements in many places. The balance of the letter is quite scary to the investors as to their imminent danger and exposure.

62. Exhibit 9 is another scary letter forcing the investors to agree to the sale or possibly lose their investment. Here for the first time the investors are told that if they take a chance and reject the sale it would be their own fault.

REPLY AFFIDAVIT OF IRA JAY SANDS
IN SUPPORT OF RULE 23 MOTION

63. For greater simplicity in practical application, I will treat with the opposing affidavit of Barry H. Singer, Esq. in a separate affidavit which I will submit herewith.

64. It is respectfully urged that Mr. Feinberg's affidavit provides absolutely no reason why the class action status should not be granted for this action as prayed for.

(Sgd.) Ira Sands
Ira Jay Sands

Sworn to before me this
12th day of March, 1974.

FRED BERMAN
Commissioner of Deeds,
City of New York 2-2150
Certificate filed in New York County
Commission Expires Sept. 1, 197[illegible]

AFFIDAVIT OF IRA JAY SANDS IN RESPONSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER FRIEDLANDER, etc., Plaintiffs, -against- PETER I. FEINBERG, et al. Defendants.	AFFIDAVIT OF PLAINTIFFS' COUNSEL IN RESPONSE TO OPPOSING AFFIDAVITS OF DEFENDANTS' COUNSEL

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

IRA JAY SANDS being duly sworn deposes and says:

1. This affidavit is submitted initially in response to the opposing affidavit of BARRY H. SINGER on the class action question.

2. Mr. Singer is not quite fair in his opposing papers. He has not submitted to the court all of the pertinent correspondence which applies to the questions he is raising, namely an accusation that plaintiffs have sat on their hands and done nothing. Many of Mr. Singer's statements of facts do not comport with other facts. The tenor of his papers would unfairly imply that the plaintiffs are seeking bribery or a payoff. Thus in the first paragraph of his affidavit and in other portions he indicates that plaintiffs have started this action only to "Wrest a settlement" upon a meritless claim. I seem to precisely recall a similar series of oral statements by Mr. Singer in another action which I commenced against another client

of his some years ago and which recently resulted in a multi-million dollar settlement. I think that the mere suggestion by him of what could be considered "blackmail" is just bad lawyering on his part. I might also call the court's attention to the fact that Mr. Cohen was the successful plaintiff in Cohen v. Tenney, recently settled after long litigation before Judge Tyler with sizable recovery for the class of real estate syndicate investors.

3. I will attempt to respond to Mr. Singer's un-numbered paragraphs seriatum by referring to the page upon which his paragraphs rest.

Page 1. Mr. Singer swears that we never mentioned anything to him about the bankruptcy stay until the Spring of 1973. This is totally inaccurate. He should recall that at an early stage in the litigation, there was ample discussion of the bankruptcy stay on the fact that the Federal action was effectively stopped. In fact, in 1970, Mr. Singer was very upset when my then associate, Robert Levin, took steps in the state court to assist in support of the rights of Mr. Cohen and the class.

4. In his letter to me of September 3, 1970, Mr. Singer remonstrated because Mr. Levin had commenced state court proceedings for discovery of records of Drake Associates. Mr. Singer said:

> "It was my understanding that you were going to permit me to examine the plaintiffs before trial and that we were then going to test the issue of the Statute of Limitations before any further proceedings in the action were taken."

"Mr. Levin told me that he was proceeding in the State Court because there was no progress being made in the Federal Court."

5. In fact on September 23, 1970, Mr. Kaminsky of Mr. Singer's office wrote to Mr. Levin informing him that Mr. Kaminsky would have the Supreme Court matter adjourned.

6. Mr. Singer and I spoke about the Zeckendorf problem. It is also hard to believe that Mr. Singer would deny knowledge of the protection afforded to him by Robert Laufer, Esq. of Paul, Weiss, Rifkind, who was wisely using the bankruptcy stay to prevent discovery and prevent forward movement of the case.

7. Mr. Singer seems to forget that plaintiff's discovery was stopped on two equal grounds. Firstly the bankruptcy stay order and secondly the threshold statute of limitations motion.

8. With Mr. Laufer exchanging so much correspondence concerning the bankruptcy stay and the effect upon the case in general, it is hard to accept Mr. Singer's statement which in effect means that either Mr. Laufer, his co-defendant counsel, nor I who was in such constant contact with Mr. Singer on this and other cases, never made mention to him of the bankruptcy stay until Spring, 1973.

Page 2. Mr. Zeckendorf and his entities are not "peripheral" in this litigation. Perhaps Mr. Singer does not "fathom" why they have been named as defendants, but there is every good reason to have named them and to hold them. The fact that they have

and no direct dealings with an investor in Drake Associates does not insulate Zeckendorf. Of course Mr. Singer would have preferred that I discontinue the action against Mr. Zeckendorf and he so urged as an alternative to the 1970 movement in the State Court. That would have made my discovery, and would have made my liability question, and would have made my jury presentation, much more difficult for plaintiffs.

Page 2. Mr. Singer suggests a separate trial for Zeckendorf since the Statute would have been tolled. That is certainly horrible procedure for a plaintiff.

9. Mr. Singer is wrong, but unfortunately I do not conduct a procedure of "paper trial", in stating that we did not precisely discuss the class action motion with respect to the threshold summary judgment and the Referee Herzog bankruptcy stay.

But, I again refer to Mr. Singer's language to me in his letter of September 3, 1970 where he said:

> "...and that we were then going to test the issue of the statute of limitations before any further proceedings in the action were taken".

10. Does Mr. Singer now intend to have us believe that his words "further proceedings in the action" would not include class action? Does Mr. Singer suggests that the bankruptcy stay will still have permitted a class action motion to be made?

11. In that respect Mr. Laufer has written to this Court and stated that I had the right to ask Referee Herzog

to lift so much of the stay order as would permit plaintiffs to make the class action motion. That suggestion is certainly not presented without appropriate laughter. Certainly plaintiffs have the right to request any Court to do anything. However even a fair lawyer would hesitate to request foolish and improper things.

12. In connection with the bankrupcty stay communications please see the exhibits of letters between my office and Mr. Laufer dated August 24, 1970, August 17, 1970, August 5, 1970.

Page 2. Mr. Singer's affidavit is replete with self serving selections accusing plaintiffs of being dilatory and not moving the action forward, despite Mr. Singer's intended summary judgment motion.

13. The exhibits to the moving affidavits herein indicate the very many times I asked Mr. Singer's office whether they were serious about making the motion, and if they were, to please rapidly make it. This commenced at the early inception of the litigation. I recognize that this was a threshold question and consented to permit Mr. Cohen to be discovered. Prior to the actual depositions, Mr. Singer's office and mine developed in some detail the possibility of discovering Mr. Cohen by way of stipulated facts, interrogatories, or an affidavit by Mr. Cohen as to his knowledge. In fact Mr. Singer even told me, over my strenuous objection, that he intended to even depose the elder Mrs. Raphael Cohen, an elderly lady whom I understand

is living along in an aged ill condition. I even offered to obtain an affidavit from Mrs. Emma Cohen as to her lack of knowledge or alternatively when that was rejected, I offered to join a representative of Mr. Singer's office at Mrs. Cohen's Bronx home to interview her and place in an affidavit form that which she told us. This was rejected. Yet no effort was thereafter made to depose Mrs. Emma Cohen.

14. As to Friedlander, the co-plaintiff who resides in the Virginia area, I strongly urged that she not be harassed. I stated that her total lack of knowledge would be presented in affidavit form because she had not lived in her father's house since long before the inception of the Drake Associates Investment. She lived out of town with her husband. A great deal of time was devoted to this argument which was finally settled after much delay.

15. Mr. Singer's office and mine negotiated on an agreed state of facts for the summary judgment statute of limitations motion.

16. The physical problem of presenting Abraham Cohen was his employment as a group chief in the U. S. Customs Department. This employment as a specialist in certain merchandise required his attendance in various parts of the nation from time to time and without much advance notice. At all times, it was known to Mr. Singer that Mr. Cohen's availability could only be for limited hours during the business day with more availability after hours or on Saturday. Also, Abraham Cohen was

nearing retirement age and was not well frequently. We never dreamt that defendants would seek to examine Abraham Cohen on such remote subjects and endless and endless. Mr. Levin of my office accompanied Mr. Cohen to the depositions and was more than patient. Subsequently, when different men at Mr. Singer's office were deposing and did not remember what their counterpart had previously asked, Mr. Levin remonstrated about the unnecessary repetition and the dragging out of the harassment.

17. Disputes arose as to questions asked previously. Mr. Singer's associates did not know because they did not show presence at the previous examinations and did not read the transcripts beforehand. The transcript will show such colloquy.

18. The documentation demanded of Mr. Cohen at the depositions was widely unrelated. For instance, copies of the Cohen Estate Tax papers, despite the fact that the Raphael Cohen handwritten investment ledger became available; tax returns, the will, probate materials, prospectuses of totally unrelated syndicates, etc. Mr. Levin was patient as the record indicates. He required Mr. Cohen to dig up time after time these various Items which were not in Mr. Cohen's possession any longer but rested with the accountants or attorneys for the Cohen Estate. Finally Mr. Levin felt certain that harassment was not at an end. Mr. Levin and I conferred and determined that we would have to take a stand or the discovery of Mr. Cohen would never end and the case would never move forward in any way by having the defendants make their threshold summary judgment motion.

19. Yet Mr. Singer provides us with Exhibits of letters written by his office adjourning the depositions and claims that it was our office which requested the depositions be adjourned. Mr. Singer's office is quite capable of writing a precise letter when the purpose is there. When our office requested a continuance, his letter was precise in placing the blame for the request on my office. For instance in the letter of February 14, 1972 from Mr. Kaminsky to Mr. Levin, he said:

> "pursuant to your telephone request to my office, continuation of the deposition of Mr. Cohen is adjourned ....."

20. On the other hand, Exhibits to Mr. Singer's affidavit do not contain such language. The basis reason is that at least half of the adjournments were at the defendant's request. The self-serving "paper trail" not only irked Mr. Levin when he was handling the matter, but after his departure when I took over the activity in the Spring of 1973, I immediately found the very same thing occurring with Mr. Lewis of Mr. Singer's office. An example is contained in my letter of April 23, 1973 to Mr. Lewis, annexed hereto as Exhibit "A". See also the letter of November 7, 1972 to Mr. Lewis by Mr. Levin , Exhibit "B". Both letters indicate the multiplicity of depositions and the lack of cooperation by the defendants.

21. Back on May 26, 1972 Mr. Levin wrote to Mr. Singer confirming another session of deposition of Mr. Cohen and offering his sincere hope that upon conclusion of that meeting (June 27, 1972) Mr. Singer would "expeditiously make a motion for summary

judgment...". He further stated that he would then wish to make the Rule 23 motion which has been awaiting the summary judgment motion. Exhibit (C).

22. Mr. Singer's view of the delays conflicts with his own own continued delay in appearing before Judge Ward and in following Judge Ward's precise instructions about making the summary judgment motion as a prerequisite to further movement in the case.

23. At the first hearing at which I was present before Judge Ward (Mr. Levin had then left the office), no representative of Mr. Singer's office appeared. All other counsel were present. After our frantic calls to Mr. Singer's office, at the suggestion of the Clerk, we obtained the appearance of an attorney from Mr. Singer's office who was not able to contribute anything because of his admitted total lack of knowledge of the matter. Yet the other attorneys made substantial progress. The Court directed the representative of Mr. Singer's office that the summary judgment motion must be made forthwith or be waived (with the defense retained for trial). It was at that time that we discussed the other proceedings which must be made in the case and it was clarified that the threshold summary judgment question must be determined first. It was at that time that the Court indicated its substantial knowledge of the Zeckendorf situation and the fact that the effect of the stay would probably no longer be felt.

24. Thereafter after a series of meetings, Judge Ward set precise dates for the exchange of papers on the summary judgment question. Mr. Singer's office was directed to comply. Yet, despite numerous extensions, on May 31, 1973, Mr. Singer wrote to the Court flatly stating that he could not comply because the client was out of town and he had his own commitments and other excuses. (Exhibit D).

25. Yet this was contrary to what Mr. Singer had told me on the phone a short time before namely that his client was available and that he would be going over a draft with his client. In any event the papers were ultimately served incomplete but accepted by me and glad to finally receive them. (Exhibit "E").

Page 5 etc. Rather than dispute Mr. Singer's one-sided description of the delays in the Cohen's depositions and his making of the summary judgment motion, page by page and paragraph by paragraph, suffice it to say that his statement is made without benefit of all the correspondence or notes and is one sided.

Page 6. Mr. Singer relates an exchange with me but he does not relate other aspects of it in which I emphasize that my reading of the file indicated to me that Mr. Levin was correct in seeing harassment and in seeing a demand for documents in session after session which were not related to the germain issues or even to the case itself.

26. Similarly, Mr. Singer is unfair in referring to Mr. Levin's inability to continue Mr. Cohen's lengthly deposition for

the full day of June 27th because of Mr. Levin's "personal committment". Mr. Singer puts those words in quotes as if to imply untruth. He and I know of very many instances of personal reasons for delay. The most recent one is Mr. Singer's adjournment in connection with this very motion because of his claim of personal illness, a claim which I never even questioned. Nor did I ever question any other requests or claim by Mr. Singer's office with respect to additional time or inability to comply with the timetable.

27. Yet Mr. Singer does not return the favor. He unfairly commented with respect not only to lateness of service of papers in the summary judgment matter wherein I had inadvertently miswritten the return date of my papers. In exchange, I related by telephone the subject matters of my defense to that motion. My messenger travelled back and forth numerous times to give to Mr. Singer draft copies of my opposing papers.

28. I have not commented when Mr. Singer served his summary judgment moving papers in an incomplete fashion. I accepted them and then he later served me a complete set.

29. Nor is it fair for Mr. Singer to have commented in this affidavit of interrogatory responses being late when Mr. Singer has available to him the correspondence between his office and mine relative to the providing me with copies of the voluminous documents used in the numerous depositions of Mr. Cohen, which documents were directed applicable to interrogatory responses.

Furthermore included in that category was the investment log book of Raphael Cohen which was not returned to me until after further demand and only grudgingly. Please see Exhibits ("F"),

Page 8. Mr. Lewis may recall that although his letter stated that he had called on several separate occasions, I was presentwhen Mr. Levin on the telephone strongly disputed that Mr. Lewis had called more than two times during Mr. Levin's absence from the office on another matter.

Page 8. Mr. Singer states that after November 3, 1972, plaintiffs "for the first time" refused to produce certain demanded documents. Mr. Singer evidently forgets that the document question was debated between Mr. Levin and various people in Mr. Singer's office on many occasions and that Mr. Singer and I discussed the situation of harassment with respect to documents and deposition.

Page 9. I was surprised to see Mr. Singer comment adversely concerning plaintiff's non appearance before the Court on January 6, 1973. Besides my heretofore lack of comment upon defendant's non-appearances, defaults etc., I am sure that Mr. Singer will recall the reason for the non-appearance which I gave to the attorneys and to the Court. It is unfair to expect courtesy and consideration but yet to fail to give the same to others.

Page 10. Mr. Singer knows, for we discussed the situation on more than one occasion, that an adjournment of the pre-trial conference was needed in large part because I was now taking

over the activity of the case since Mr. Levin had left. In order to accomplish what was necessary in education, a complete review of the entire file (large as it is was essential .)

Page 10-11. Mr. Singer speaks about the documents which were not supplied to him and the responses which were not supplied. He then attempts to convince us that he went ahead with his summary judgment motion because he did not want to further delay the matter to seek court direction for production. He indicates that the task of seeking additional production and compliance "would consume another year and inordinate expense". This is not logical! Plaintiffs provided Mr. Singer with far more responses in the depositions and far more documents than the Rules would require. His fishing expedition was unusual. Mr. Levin and Mr. Cohen were patient. If Mr. Singer felt strongly about his position with respect to additional discovery, a conference before Judge Ward could be arranged in a matter of days. Judge Ward has a record for prompt disposition of such discovery disputes. No! the answer is that Mr. Singer did not feel he was on strong grounds to enlist the aid of the Court in furthering a fishing expedition for larger game; but in the interim, he had devoured sizable gulps of time and stopped the plaintiffs dead in their tracks as was evidently the game plan.

Page 12. Again in the next to the last paragraph, Mr. Singer resorts to his claim of "blackmail". I have commented on my opinion of this tactic. This was the cry back again in the older days, perhaps before Mr. Singer's active

time, when attorneys for stockholder-plaintiff knew that they would meet with the cry of "strike suit". Is Mr. Singer renewing that cry?

30. No, Mr. Singer is wrong in that the forward movement has astutely been stopped by the defendants. Even the attempt to "carry the ball around the end" by having the plaintiffs go into the State Court in 1970 was aborted by defendants.

31. Mr. Singer knows that the prevention of a class action herein would be the death knell of this action and that no plaintiff could afford to institute individual action herein.

32. Providing Mr. Singer with the greatest benefit of every doubt, the summary judgment motion and the bankruptcy stay have prevented the making of a class motion.

33. On the other hand if I was unknowingly drawn in and if this delay was preconceived, then my generosity with extensions of time and generosity with making Mr. Cohen available time after time after time, etc. should not be a cause for denial of a class motion.

34. The moving papers have clearly established that all of the other ingredients required for class designation are present. Plaintiffs urge that the time factor was proper, was necessary, was bankruptcy court directed, was procedurely advisable and excusable.

Fred Berman

FRED BERMAN
Commissioner of Deeds,
City of New York 2-2150
Certificate Filed in New York County
Commission Expires Sept. 1, 197

(Sgd) Ira Sands
IRA JAY SANDS

EXHIBIT ANNEXED TO AFFIDAVIT

LAW OFFICES OF
IRA JAY SANDS

701 SEVENTH AVENUE
NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

April 23, 1973

Paul Z Lewis, Esq.
Messrs. Pollack & Singer
61 Broadway
New York, New York 10006

Re: Cohen v. Feinberg

Dear Mr. Lewis:

Please don't start these self-serving declaration letters with me, that you were doing with Mr. Levin. Let's start out with each other on a fresh plain now that I am handling this case. Your letter of April 23rd contains too many self-serving statements which only tend to create a sandpaper reaction, and I don't think that you intend it to do that.

You and I both know why Mr. Levin finally gave you access to Mr. Cohen's ledger book, and why he left it there for your convenience, but to be returned promptly. We both know that the book was supposed to have been returned promptly, and we both know that the book does have bearing on the interrogatories.

As to the last paragraph of your letter, I am most anxious for you to tell me in what way you know that I "have, or have had custody of all such documents". Also, how in view of the responses to the questions on the deposition can you say that Mr. Cohen or representatives of the Cohen Estate have or have had such custody.

Also, I think reflection will indicate to you that you are not correct when you say that requests have not been made for delivery of the exhibits, just as a question has previously arisen with respect to delivery of copies of a transcript to which the exhibits form a part.

Are you going to make your motion for dismissal, based upon the statute of limitations, or are you not. This motion has been a very long time in the making and as has been repeated, the last time before Judge Ward, the motion forms the very basis of the procedures to be followed in this case.

-cont-

EXHIBIT ANNEXED TO AFFIDAVIT

Not only will I personally appreciate your finally making this motion, but I think that you are now being put to the test of making it or not making it. The years have passed quickly since the motion was first discussed.

Yours truly,

IRA JAY SANDS

IJS.sj

EXHIBIT ANNEXED TO AFFIDAVIT

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

November 7, 1972

Paul Z. Lewis, Esq.
Messrs. Pollack and Singer
61 Broadway
New York, New York 10006

Re: Cohen v. Feinberg

Dear Paul:

I am in receipt of your letter dated November 8, 1972, and I am quite appalled at its contents. While I have not chosen, up to this moment, to engage with you in what might be facetiously termed "a self-serving paper trail," I believe that your records should reflect the following.

For every adjournment that ever occurred with regard to the above matter, your office through Mr. Singer, Mr. Kaminsky or yourself, has requested at least, if not more than fifty percent of the adjournments. In fact, the last adjournment was had at your specific and personal request.

I have produced Mr. Cohen at your office on three separate occasions. It is not the plaintiff's fault that he is of retirement age and personally not in the best of health. He has done his best to comply with the requirements of the applicable federal rules of civil procedure and he shall continue to do so.

In reviewing your letter dated October 5, 1972, I have concluded that the documents required in the second paragraph would be more appropriately obtained under a Rule 34 demand, and accordingly the plaintiff will not produce them at what I hope will be the final session of his deposition.

Very truly yours,

ROBERT B. LEVIN

RBL/jmc

EXHIBIT "B"

COPY

EXHIBIT ANNEXED TO AFFIDAVIT

Law Offices
ROBERT B. LEVIN

(212) 265-3500

701 SEVENTH AVENUE
NEW YORK, N.Y. 10036

May 26, 1972

Pollack & Singer, Esqs.
65 Broadway
New York, New York

Re: Cohen vs. Feinberg

Attention: Barry H. Singer, Esq.

Dear Barry:

Confirming our recent conversation wherein it was agreed that the continued oral deposition of plaintiff Abraham Cohen is adjourned until June 27, 1972, at 10:30 A.M. in your office.

It is sincerely hoped that upon conclusion of this meeting, you will be able to expeditiously make your motion for summary judgment on the statute of limitations issue and resolve this singular question.

You know that we have refrained from making our application pursuant to Rule 23, et seq. F. R. Civ. P. for class determination pending decision on the foregoing Rule 56, F. R. Civ. P. motion.

Sincerely yours,

Robert B. Levin

ROBERT B. LEVIN

RBL/sj

EXHIBIT "C"

A-201

EXHIBIT ANNEXED TO AFFIDAVIT

POLLACK & SINGER

61 BROADWAY, NEW YORK, N. Y. 10006

BARRY H. SINGER
DANIEL A. POLLACK
MARTIN I. KAMINSKY
NEIL D. THOMPSON
PAUL Z. LEWIS
RICHARD M. ASCHE

(212) 952-0330

May 31, 1973

Honorable Robert Ward
United States District Judge
United States District Courthouse
Foley Square
New York, New York 10007

Re: Esther Friedlander et al.
v. Peter I. Feinberg, et al.
70 Civ. 2561

Dear Judge Ward:

Due to circumstances beyond our control which include the absence of our client from the state and Court commitments which have engaged me and my associates who have been working on this case, we cannot meet the deadline for the motion for summary judgment. In part, this is also due to the fact that plaintiffs' responses to our interrogatories were not timely served and were evasive and not responsive.

We believe that the motion will be dispositive of the case. On the other hand, our clients' interest would not be properly served nor would the interest of the Court be properly served by the filing of hastily prepared inadequate papers. We hope that we will have the papers filed prior to the conference now scheduled for the eighth of June.

Respectfully yours,

Barry H. Singer

Barry H. Singer

cc: Ira J. Sands, Esq.

EXHIBIT "D"

COPY

IRA JAY SANDS

EXHIBIT ANNEXED TO AFFIDAVIT

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

June 4, 1973

Honorable Robert J. Ward
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Friedlander vs. Feinberg

Dear Judge Ward:

I have received a copy of the letter of May 31, 1973 to your Honor by Barry H. Singer, Esquire.

For the past many years, I have requested Mr. Singer's office, both by letter and orally, to serve the summary judgment motion papers as rapidly as possible (even earlier than the various deadline dates heretofore set), so that I could move along toward determining what discovery I may need and prepare my response to the motion.

Defendants have had a number of years for the preparation of this motion since they first mentioned their intentions. Defendants also had numerous depositions of plaintiff Cohen, while we had no discovery rights whatsoever.

A recent conversation with Mr. Singer two weeks ago indicated that the motion papers were in draft dictation and defendant Feinberg was to go over them within a day or two.

It has been quite important to me to receive the motion papers early so that I would know what preliminary discovery of documents I require from the accountants' work papers, and also from the two Zeckendorf Trustees (you recently received a copy of a letter of understanding between Robert Laufer, Esq. of Paul, Weiss, Rifkind, Wharton & Garrison and myself concerning Zeckendorf documents).

-cont-

EXHIBIT "E"

COPY

EXHIBIT ANNEXED TO AFFIDAVIT

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

As soon as I receive Mr. Singer's motion papers, I will be in a position to ask the two Trustees to make available their inventory lists of the documents in their warehouses. I will then have to examine certain of those documents, hopefully a very limited number, pertaining solely to the questions involved in Mr. Singer's motion papers.

I will have to sit with the attorneys for the accountants and do likewise with respect to their documents which bear upon the questions which will be raised in the summary judgment motion.

I write this letter to bring your Honor up to date and to dispute Mr. Singer's statement that the plaintiffs' responses to the interrogatories were not timely served, which they were. I also dispute that they were evasive and not responsive. They responded very clearly with all the information which we have had, despite the fact that there has been no plaintiffs' discovery permitted and further in view of the fact that the interrogatories repeated themselves paragraph after sub-paragraph after sub-paragraph. Furthermore, the interrogatories in part also repeated certain territory which had been inquired into during approximately five deposition sessions of plaintiff Cohen.

I do not intend by this letter to rebuke Mr. Singer in any manner, for I hold him in high esteem. He knows that so long as my clients' interests would not be prejudiced, I have never denied him a requested extension or courtesy over the years.

Yours truly,

IRA JAY SANDS

IJS.sj

cc: To Counsel

COPY

IRA JAY SANDS

EXHIBIT ANNEXED TO AFFIDAVIT

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-3500

April 24, 1973

Honorable Robert J. Ward
United States District Judge
United States Courthouse
Foley Square, New York

Re: Cohen v. Feinberg - 70 Civ. 2561

Dear Judge Ward:

At the Pretrial Conference before you, it was agreed that the interrogatories served by the defendants would be responded to by April 20, 1973.

During the preparation of the responses, and in order to make certain that the responses were not erroneous, it was necessary to again remind the defendants to furnish us with copies of the exhibits which they themselves introduced in the very extensive depositions which they took of the plaintiff Cohen.

In addition, during Mr. Cohen's extensive depositions, the attorney from my office who accompanied Mr. Cohen to the depositions, left with the defendants' counsel for their examination and prompt return a bound ledger book maintained in the handwriting of the late Raphael Cohen disclosing notations of many different investments made by Mr. Cohen over the many years.

Although the interrogatory responses were completed last week, I felt it advisable not to release them until I had read the bound ledger of the late Mr. Cohen, which the defendants still retained in their possession, and which they had not returned to Mr. Cohen or to my office. Neither could I release the responses until I had seen the 64 exhibits (almost all consisting of numerous pages) which plaintiffs had introduced on Mr. Cohen's various depositions in 1971 and 1972, almost all of which we have never seen before at my office.

These items were finally delivered to me on Monday afternoon, April 23, and the responses are being finalized for immediate service upon the defendants.

-cont-

EXHIBIT "F"

COPY

EXHIBIT ANNEXED TO AFFIDAVIT

IRA JAY SANDS

LAW OFFICES
701 SEVENTH AVENUE, NEW YORK, N.Y. 10036
(212) COLUMBUS 5-0880

Hon. Robert J. Ward -2- April 24, 1973

I am informed that Mr. Cohen is not presently in New York, and is down South, I will therefore serve the interrogatories without Mr. Cohen's signature, and then obtain his signature at the first possible moment upon his return, and then deliver a signed copy to the defendants.

Respectfully yours,

IRA JAY SANDS

LJS.sj
cc: To Counsel

COPY

REBUTTAL AFFIDAVIT
By Barry H. Singer

United States District Court
Southern District of New York

Esther Friedlander, at ano, Plaintiffs, -against- Peter I. Feinberg, et al., Defendants.	Rebuttal Affidavit Index No. 70 Civ. 2561 (RJW)

Barry H. Singer, being duly sworn, deposes and says:

The attorney for plaintiff in his Reply Affidavit has questioned the truthfulness of my affidavit regarding the many delays and adjournments in this case. In this connection, I wish to make two points:

First, my affidavit is based upon my own personal knowledge of the facts contained therein. Mr. Sands, on the other hand, repeatedly denied having any knowledge of what his associate Mr. Levin was doing in this case. These denials of knowledge were made to

REBUTTAL AFFIDAVIT
By Barry H. Singer

me on every occasion (and there were many) when I complained about the improper and dilatory tactics of Mr. Sands' office.

Secondly, on the question of credibility, I respectfully draw to the Court's attention the comments regarding the conduct of plaintiff's counsel in Taub v. Glickman, not officially reported, CCH Fed. Sec. L. Rep. 92,974 (S.D.N.Y. Dec. 1, 1970); Korn v. Franchard, corporation, 478 F.2d 115, 117 and 125 (2nd cir. 1973).

My failure to deal point by point with the irresponsible statements made in each and every paragraph of the Reply Affidavit should not be deemed by the Court as acquiescence in any of them. However, I beleive I should put in context the language which is quoted incompletely and out of context at pps. 2-3 of Mr. Sands' Affidavit. Accordingly, I annex hereto copies of letters which I wrote to Mr. Sands on July 20, 1970 and September 3 (not September 30), 1970. It is from the latter that Mr. Sands made his deceitfully incomplete quotation.

S/ Barry H. Singer
Barry H. Singer

Sworn to before me this
13th day of March, 1974.

EXHIBIT TO BARRY H. SINGER RUBUTTAL AFFIDAVIT

July 20, 1970

Sands, Geller & Webb, Esqs.
701 Seventh Avenue
New York, New York 10036

Re: Friedlander & Cohen v. Drake Associates - 60 East 42nd Street, New York, New York 10017

Dear Sirs:

On Monday July 13, 1970 I invited you to be my guest for lunch and opened up my files to you in an attempt to demonstrate to you, what is obvious, that there were no misrepresentations in connection with the Drake Associates syndication and that the matters alleged in your complaint on the matter were known or should have been known to Raphael Cohen more than six years prior to the commencement of the lawsuit and that accordingly the lawsuit is barred by the statute of limitations. You informed me that you would look into the matter further and then would discuss it with me.

On that very day without any notice to me and without any mention whatsoever during our lunch meeting or thereafter you served upon the partnership a demand for an inspection of the partnerships books signed by someone who purports to be executor of the estate of Raphael Cohen, but who consistently refused to provide to the partnership any evidence of his

EXHIBIT "A"

EXHIBIT TO BARRY H. SINGER REBUTTAL AFFIDAVIT

authority to act for the said estate.

Under all of the circumstances the partnership will not accede to Mr. Cohen's demand for examination and inspection of its books. Please be advised and please advise Mrs. Friedlander and Mr. Cohen that the partnership will look to them and to the estate of Raphael Cohen for indemnification against the unwarranted and unjustifiable expense to which they and you insist upon putting the partnership.

Very truly yours,

Pollack & Singer

By:_____

cc: Charles Rubman, Esq.
230 Park Avenue
New York, N. Y. 10017

Mr. Peter Feinberg
60 East 42nd Street
New York, N. Y. 10017

EXHIBIT TO BARRY H. SINGER REBUTTAL AFFIDAVIT

September 3, 1970

Ira J. Sands, Esq.
701 Seventh Avenue
New York, N. Y. 10036

Re: Friedlander v. Feinberg

Dear Ira:

I today received a telephone call from your Mr. Levin informing me that he intends to proceed with a New York State Court proceeding for discovery of the records of Drake Associates. Mr. Levin asked me whether I would accept service of the papers or whether it would be necessary to serve them on my client. I told Mr. Levin that I would accept service of the papers.

I also told Mr. Levin that I regarded his proceeding in this manner to be contrary to the understanding which you and I had reached. It was my understanding that you were going to permit me to examine the plaintiffs before trial and that we were then going to test the issue of the statute of limitations before any further proceedings in the action were taken. I have been waiting patiently for you or Mr. Levin to let me know the date when I may examine the plaintiffs before trial. Mr. Levin told me that he was proceeding in the State Court because there was no progress being made in the Federal Court. I told Mr. Levin that the only reason there was no progress in

EXHIBIT "B"

EXHIBIT TO BARRY H. SINGER REBUTTAL AFFIDAVIT

the Federal Court was the failure of him to arrange for dates for depositions of the plaintiffs,

I also told Mr. Levin that this was the second disappointment I had received in connection with what I thought were commitments of your firm. Mr. Levin made some snide comments about having my letter before him and it not being worthy of a reply. I cut him off before he got very far along those lines.

I will proceed in this action in the manner required to meet the tactics of Mr. Levin. I understand that he is your partner and not your employer.

I regret that I will not be able to extend to him the courtesies which I am accustomed to extending to you. I suspect that no effort whatsoever is being made to arrange for the depostions of the plaintiffs. Accordingly, I enclose herewith a new notice to take their depositions. I would not agree to an adjournment. If they do not appear at the appointed time I will make the appropriate motions to the Court. I think that Mr. Levin has unfairly and wrongfully traded with me upon your good will.

Sincerely,

BHS

Enclosure.

cc: Charles Rubman, Esq.
Leepson, Rubman & Ross, Esqs.
230 Park Avenue
New York, New York 10017

REBUTTAL AFFIDAVIT OF
IRA JAY SANDS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER FRIEDLANDER, et ano,

Plaintiffs,

-against-

PETER I. FEINBERG, et al.,

Defendants.

PLAINTIFF's
REBUTTAL AFFIDAVIT

Index No. 70 Civ.2561
(RJW)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

IRA JAY SANDS, being duly sworn, deposes and says:

1. In response to the rebuttal affidavit of Barry H. Singer, Esq., It has not been my intention to permit this class motion to be diverted to test reliability, veracity or even counsels' independent view of the facts, other than particular facts pertinent to this case. Of course, I am sorry that a relationship of friendship over a period of many years has floundered.

2. Mr. Singer claims his affidavit alone is based upon his own personal knowledge of the facts contained therein. I believe his words are <u>not</u> precise!

REBUTTAL AFFIDAVIT OF
IRA JAY SANDS

3. Most telephone calls and most correspondence were not had by Mr. Singer! The writings show that but for few, most were by his associates, Messrs. Ashe, Lewis and Kaminsky. Thus Mr. Singer has evidently not grasped the facts sufficiently, or else he would not say his affidavit was based upon his own personal knowledge.

4. My affidavit was clear in what statements were based upon the correspondence, which were based upon my own letters and telephone calls and those facts which were based upon what I heard or was told that my office associate had done.

5. Mr. Singer's last ditch attempt to discredit plaintiffs' position by citing cases is not only in surprising bad taste for him, but inaccurate. He attempts to treat with opposition by striking out blindly with both his hands. This is similar to what he did not long ago to FRANK WEINSTEIN, ESQ. during the litigation involving Fundamental Investors and Anchor Growth Fund, where Mr. Singer orally and in writing threatened Frank Weinstein, Esq., Charles Trynin, Esq. and perhaps others with contempt of court. In fact, when Mr. Weinstein refused to be intimidated, Mr. Singer went so far as to invoke rather dire criticism of Mr. Weinstein and to move to punish him for contempt. Of course, the court denied

the motion.

6. Mr. Singer's citation of Taub has already been discussed as having far different facts than this case, although both were real estate oriented. Taub involved interrogatories called boiler plate since they had been duplicated from ones in other real estate matters and other aspects of appearances. In fact, the same Jurist later selected me as Lead Counsel in the consolidation of the Value Line cases, a JPML referral, utilizing complimentary language.

7. Why did Mr. Singer forget to cite the reversal of Korn, (456 F.2d, 1206, 2nd Cir. 1972) first on motion and then on appeal, both argued on behalf of Korn by Herbert Brownell, Esq. Mr. Singer received and read at the time of its presentation to the Court of Appeals, the details in the Korn briefs prepared by Mr. Brownell. We discussed it. Mr. Singer knows that in Cohen v. Franchard, the trial counsel were O. John Rogge, Esq. and Messrs. Weisman, Celler, Allan, Spett and Sheinberg. Mr. Singer mistakenly writes his sentence as if I tried the case myself entirely. The appeal cited by him was handled by Demov, Morris, Levin & Shein and by me.

REBUTTAL AFFIDAVIT OF
IRA JAY SANDS

8. Mr. Singer is less than frank in his overzealousness and strong language despite the fact that over the years, even very recently, he never hesitated to take full advantage of our friendship.

9. In plaintiff's moving Memorandum of Law, plaintiff cited the very recent case of Bisgeier v. Fotomat Corporation, Dist. Ct. No. Ill., (Nov. 21, 1972 and Dec. 27, 1973), the citation being to B.N.A.'s U.S. Law Week. Annexed hereto for the Court's assistance, is a complete copy of the opinions of the Bisgeier Court, borrowed from U.S. Law Week library and just now received. Bisgeier is in point. It refutes arguments presented by defendants on the question of commonness of Statute of Limitations facts (particularly pages 4-5 of Bisgeier opinion).

10. In Bisgeier, defendants also raised the question of individual reliance issues. The Court treated with that point on pages 6-7, relying in part upon Affiliated Ute Citizens.

11. Bisgeier likewise held that the common course of conduct constituted a wrong, common to all (pages 8-9).

REBUTTAL AFFIDAVIT OF IRA JAY SANDS

It is respectfully urged that this action be certified as a class action.

(Sgd) Ira Sands

Sworn to before me this
20th day of March, 1974.

By Fred Berman

Fred Berman

FRED BERMAN
Commissioner of Deeds,
City of New York 2-2150
Certificate filed in New York County
Commission Expires Sept. 1, 197

ORDER of Hon. Robert J. Ward
DENYING CLASS STATUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER FRIEDLANDER and ABRAHAM COHEN on behalf of themselves and all other Purchasers of Limited Partnership Interests in Drake Associates, similarly situated,

Plaintiffs,

-against-

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., AGRIN, LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants.

70 Civ. 2561 (RJW)

Plaintiffs move for an order pursuant to Rule 23(c)(1), Fed. R. Civ. P., determining that this 1970 action may proceed as a class action. For the reasons hereinafter stated, the motion is denied.

On June 17, 1970 plaintiffs commenced this action alleging in their complaint violations of §17(a)

ORDER of Hon. Robert J. Ward
DENYING CLASS STATUS

of the Securities Act of 1933 (15 U.S.C. §77q(a)). §10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b) and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5); §§352-c and 352-e of the New York General Business Law; and the common law. Plaintiffs, as executors of the estate of the late Raphael Cohen, allege that Mr. Cohen was defrauded in his purchase of a limited partnership interest in Drake Associates because a prospectus dated October 22, 1959 contained misleading information and also failed to set forth information required so as to make statements contained therein not misleading. A copy of this prospectus was furnished to Mr. Cohen in or about November, 1959, and he purchased his limited partnership interest on February 4, 1960. His monthly distributions under the terms of the limited partnership agreement were suspended in March, 1963, after Zeckendorf Hotels Corporation, the tenant on a net lease of the sole property owned by Drake Associates, fell into arrears on its rental payments. It also appears to be undisputed that the various Zeckendorf business interests suffered heavy financial losses about that time. Furthermore, Zeckendorf and his various business entities filed petitions in bankruptcy in July, 1964 and May, 1965.

ORDER of Hon. Robert J. Ward
DENYING CLASS STATUS

Plaintiffs seek class determination on behalf of all persons who purchased limited partnership interest in Drake Associates after receiving the 1959 prospectus and who thereby sustained damage.

Defendant Lawson & Holland filed its answer on August 25, 1970. The time of the other defendants to answer was adjourned by stipulation until 30 days after the completion of the depositions of plaintiffs. Defendant Peter I. Feinberg originally noticed depositions of plaintiffs for July 30, 1970. These depositions were renoticed for September 21, 1970. Defendant Harris, Kerr, Forster & Company also noticed depositions of plaintiffs for the latter date. The first session of the deposition of Abraham Cohen finally took place on May 11, 1971. The continuation of this deposition was adjourned numerous times and finally was resumed on June 27, 1972 and continued on August 28, 1972 and December 6, 1972. Much of the blame for this delay must be attributed to plaintiffs.

Furthermore, plaintiffs did not make timely or completely responsive answers to interrogatories served upon them, and their attorney failed to appear as directed at a pre-trial conference with the Court on

ORDER of Hon. Robert J. Ward
DENYING CLASS STATUS

January 26, 1973.

Plaintiffs noticed a deposition of defendant William Zeckendorf for May 25, 1973, and made a demand for production of documents from all defendants on June 12, 1973.

Defendants' motion for summary judgment dismissing the complaint was denied on January 22, 1974.

This motion for class determination was originally returnable on March 8, 1974, but the return date was adjourned to March 15, 1974. Defendants contend that the motion should be denied for untimeliness and that plaintiffs' failure diligently to prosecute the action demonstrates that they are unfit "fairly and adequately [to] protect the interests of the class." Fed. R. Civ. P., Rule 23(a)(4).

Civil Rule 11A(c) of this Court, which became effective April 30, 1970 (prior to the commencement of this action, requires that:

> Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed. R. Civ. P. 23(c)(1) as to whether the action is to be maintained as a class action and, if so, the membership of the class. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action averments, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be

> appropriate and necessary in the circumstances. Whenever possible, where the determination is ordered to be postponed, a date will be fixed in the order for renewal of the motion before the same judge.

No circumstances are present which would justify a delay of almost four years in bringing this motion. Plaintiffs proffer the arguments that an order of the Bankruptcy Court in a proceeding involving defendant William Zeckendorf prohibited plaintiffs' active prosecution of their action and that defendants' motion for summary judgment and discovery related thereto also excuse their delay. These contentions are not persuasive. Although counsel for Zeckendorf did indicate in a letter to plaintiffs' counsel his view that all actions in which Zeckendorf was named as a defendant were subject to the bankruptcy stay. The reply of counsel for plaintiffs indicated their intention to proceed with this action as to al defendants except Zeckendorf. Reliance on the prospective motion for summary judgment as an excuse for the delay is likewise without merit.

In addition the record in this action shows a total absence of the vigorous prosecution so crucial

in class actions. This is apparent from the numerous delays and general lack of activity outlined above.

The Court holds that plaintiffs have not evidenced the interest in class claims necessary for the fair and adequate protection of such claims. Mersay v. First Republic Corporation of America, 43 F.R.D. 465 (S.D.N.Y. 1968). This conclusion is based upon the untimeliness of this motion and the absence of diligent prosecution. Jonah Dienstag v. Alexander N. Bronsen, 68 Civ. 576 (S.D.N.Y. May 12, 1972); see also, Taub v. Glickman, CCH FED. Sec. L. Rep. ¶92,874 (S.D.N.Y. Dec. 1, 1970).

Accordingly, plaintiffs' motion for an order determining that this action may proceed as a class action is denied and the class action averments are stricken.

It is so ordered.

(Sgd) Robert J. Ward
U. S. D. J.

Dated: April 22, 1974

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ESTHER FRIEDLANDER and ABRAHAM COHEN on behalf of themselves and all other Purchasers of Limited Partnership Interests in Drake Associates, similarly situated.

Plaintiffs,

-against-

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., AGRIN, LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants.

----------x

70 Civ. 2561 (RJW)

NOTICE OF APPEAL

S I R S:

PLEASE TAKE NOTICE that plaintiffs herein appeal to the United States Court of Appeals for the Second Circuit, located at the United States Courthouse, Foley Square, New York, New York, from each and every part of an Order of the Honorable Robert J. Ward, United States District Judge, dated April 22, 1974, denying a motion by plaintiffs for an order determining that this action may proceed as a class action,

NOTICE OF APPEAL

and which order further directs the striking of class action averments.

IRA JAY SANDS

By (Sgd) Ira Jay Sands
Attorney for Plaintiffs
Office and Post Office Address
701 Seventh Avenue
New York, New York 10036
CO 5-3500

Dated: New York, New York
May 21, 1974

Fred Berman

FRED BERMAN
Commissioner of Deeds,
City of New York 2-2150
Certificate filed in New York County
Commission Expires Sept. 1, 197

A 202 Affidavit of Personal Service of Papers — H — LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS: SECOND CIRCUIT

Index No.

ESTHER FRIEDLANDER,
Plaintiff-Appellant,

against

PETER I. FEINBERG, et al,
Defemdants-Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortegá, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 29th day of November 1974 at 61 Boradway, New York

deponent served the annexed Appendix upon

[redacted] POLLACK & SINGER, (con.) *

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 29th day of November 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 6418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

* Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Ave, New York

* Mendes & Mount, 27 Williams St. N.Y.

* D'Amato, Costello, & Shea
116 John Street